84-824

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. BILENKY*
General Counsel

Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

*Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

Whether the Federal Communications Commission has exceeded its Legislative grant of authority in imposing an "end user access charge" and as such has acted in an *ultra vires* manner.

Whether the Federal Communications Commission has, for the convenience of administration, violated the universal service mandates of the Communications Act in establishing without cost justification and in violation of 47 U.S.C. § 202, a discriminatory local rate depriving local ratepayers of equal protection of the law.

PARTIES

The parties to the proceeding before the U.S. Court of Appeals for the District of Columbia Circuit are listed below.

Petitioners and intervenors supporting petitioners were as follows:

National Association of Regulatory Commissioners;
Public Service Commission of the District of Columbia;
People of the State of California and the Public Utilities Commission of the State of California;
MCI Telecommunications Corporation;
Lexitel Corporation;
Western Union Telegraph Company;
North American Telecommunications Association;
Aeronautical Radio, Inc.;
United States Transmission Systems, Inc.;
Telesphere Network, Inc.;
Association of Long Distance Telephone Companies;
Iowa State Commerce Commission;
Washington Utilities and Transportation Commission;
Rural Telephone Coalition;
New York State Department of Public Service;
Roseville Telephone Company, *et al.*;
National Association of State Utility Consumer Advocates;
Maryland Office of People's Counsel;
Florida Public Service Commission;
Steven W. Hamm, as Consumer Advocate for the State of South Carolina;
Vermont Public Service Board;
Arizona Corporation Commission;
Public Service Commission of Wisconsin;
Public Service Commission of West Virginia;

State of Alaska, *et al.*;
Public Service Commission of Alabama;
Department of Public Utility Control of the State of Connecticut;
South Dakota Public Utilities Commission;
Missouri Public Service Commission;
State of Michigan, *et al.*;
American Petroleum Institute;
Association of Data Communications Users;
Utilities Telecommunications Council;
GTE Sprint Communications Corporation;
Satelco, Inc.;
Teletec Serving Communications Company;
U.S. Telephone, Inc.;
U.S. Transmission Systems, Inc.;
Tel Systems Management Corporation; and
GTE Service Corporation.

Respondents and intervenors supporting respondents were as follows:

Federal Communications Commission;
United States of America;
International Business Machines Corporation;
Bell System Operating Companies, *et al.*;
American Telephone & Telegraph Company;
MCI Telecommunications Corporation;
Rochester Telephone Corporation;
United States Telephone Association;
ROLM Corporation;
Ad Hoc Telecommunications Users Committee; and
Association of Data Processing Service Organizations.

The following parties were granted intervenor status but did not file briefs. Their positions are not known to Petitioner:

Centel Corporation;
United Telephone Systems, Inc.;
American Broadcasting Companies, Inc.;
Illinois Commerce Commission;
Combined Network, Inc.;
Enhanced Communication Services Association; and
Allnet Communications Services, Inc.

Petitioner, Florida Public Service Commission (FPSC), is a state regulatory agency created under Chapter 350, Florida Statutes. The FPSC is charged by state law to regulate the rates, tolls and charges of various industries pursuant to specific statutory authority. The FPSC has authority under Chapter 364, Florida Statutes, to regulate the intrastate rates, tolls and charges of investor owned telephone companies operating within the State of Florida. The FPSC is the appropriate state agency to represent the State in matters dealing with the regulation of telephone companies. Section 364.01, Florida Statutes (1983).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL COMMUNICATIONS COMMISSION HAS EXCEEDED ITS LEGISLATIVE GRANT OF AUTHORITY IN IMPOSING AN "END USER ACCESS CHARGE" AND AS SUCH HAS ACTED IN AN *ULTRA VIRES* MANNER 7

II. THE FCC'S ACCESS CHARGE VIOLATES THE UNIVERSAL SERVICE MANDATES OF THE COMMUNICATIONS ACT IN IMPOSING A BURDENSOME, DISCRIMINATORY RATE FOR THE CONVENIENCE OF AGENCY ADMINISTRATION 17

CONCLUSION 28

Statutory Provisions:

47 U.S.C. § 151 ..... 1a

47 U.S.C. § 201(a) 1a

Page

47 U.S.C. § 202 ..... 2a

47 U.S.C. § 221(b) 2a

Florida Statutes:

§ 364.03 ..... 3a

§ 364.035 ..... 4a

§ 364.05 ..... 5a

§ 364.14 ..... 7a

TABLE OF AUTHORITIES

Cases: Page

Ad Hoc Telecommunications Users Committee v. F.C.C.,
680 F.2d 790 (D.C. Cir. 1982) 17

American Broadcasting Co., Inc. v. F.C.C.,
663 F.2d 133 (D.C. Cir. 1980) 18

Geduldig v. Aiello,
417 U.S. 484 (1974) 22

National Association of Regulatory Utility Commissioners v. F.C.C.,
737 F.2d 1095 (D.C. Cir. 1984) 16, 24

National Association of Regulatory Utility Commissioners v. F.C.C.,
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Case No. 84-95 ..... 12, 13, 15

Nader v. F.C.C.,
520 F.2d 182 (D.C. Cir. 1975) 17, 23

North Carolina Utilities Commission v. F.C.C.,
537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) 26, 27

Smith v. Illinois Bell Telephone,
282 U.S. 133 (1930) ..... *passim*

St. Joseph Stock Yards Co. v. United States,
298 U.S. 38 (1936) 15

Administrative Decisions:

MTS and WATS Market Structure: Third Report and Order,
93 F.C.C.2d 241 (1983) (*Access Charge Order*) 16, 20, 22

Page

Notice of Proposed Rulemaking, in CC Docket No. 84-800, FCC 84-395: Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers, 49 Fed. Reg. 32,871 (1984) 19

Statutes:

The Communications Act of 1934:

47 U.S.C. § 151 12

47 U.S.C. § 152(b) 11

47 U.S.C. § 201(a) 27, 28

47 U.S.C. § 202 ..... 17, 28

47 U.S.C. § 202(a) 23

47 U.S.C. § 205 28

47 U.S.C. § 221(b) 11

Florida Statues:

§§ 364.03, *et seq.* (1983) 11

Florida Public Service Commission Dockets:

In the Matter of Intrastate Telephone Access Charges for Toll Use of Local Exchange Services, Docket No. 820537-TP 12

State Tariffs:

ALLTEL Tariff A3.3.1 – Ft. White, Florida 19

Page

New York Telephone Company Compliance Tariff filing, October 22, 1984, § 1 18

Southern Bell Telephone Company Tariff A3.4.2B – Miami, Homestead, North Dade and Perrine, Florida 18

Southern New England Telephone Company Tariffs Part X, § 2 – Ansonia and Hartford, Connecticut 18

United Telephone Company Tariff A3.C.2. – Sebring, Florida 19

United Telephone Company Tariff A3.C.2. – Boca Grande, Everglades and Moore Haven, Florida 18

Publications:

Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 64 Harv. L. Rev. 436 (1954) 21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Florida Public Service Commission (FPSC) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 12, 1984. Reconsideration was sought and disposed of by the Circuit Court of Appeals for the District of Columbia Circuit on August 23, 1984. *National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is reported at 737 F.2d 1095

(D.C. Cir. 1984). The Federal Communications Commission's *Access Charge Order* is reported at 93 F.C.C.2d 241 (1983). Its order on initial reconsideration is reported at 48 Fed. Reg. 42,984 (1983). Its order on further reconsideration is reported at 49 Fed. Reg. 7,810 (1984).

JURISDICTION

The decision of the District of Columbia Circuit was entered on June 12, 1984. Reconsideration was sought and disposed of by the Circuit Court of Appeals for the District of Columbia Circuit on August 23, 1984. This petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Relevant United States Code provisions are set out in Appendix A, and relevant Florida statutory authority is set out in Appendix B.

STATEMENT OF THE CASE

The controversy has arisen because, over the years, many costs associated with the provision of local telephone services had been subsidized by the rates charged for long distance services.

The Federal Communications Commission (FCC or Commission) first undertook to try and apportion costs associated with the provision of local and long distance services. It sought to separate those local costs, which had been traditionally recovered through interstate usage-sensitive toll rates. Finally, the Commission, for ease of administration, designed a flat rate increase to all subscribers of local

service without regard to the costs associated with the provision of like communications services. The FCC intruded upon the regulatory jurisdiction of the States in imposing a rate increase for local service which on its face is unjustifiably discriminatory and in violation of the customers' equal protection rights. At issue here is a jurisdictional question as to who has the authority to design a rate structure for the recovery of these local costs.

Before 1930, in many jurisdictions, all local exchange plant costs were paid by local subscribers and were included in their local rates. Local telephone companies did not receive any reimbursement from AT&T or long-distance customers for the origination and termination of their interstate calls.

However, this changed after 1930 when this Court decided *Smith v. Illinois Bell Telephone*, 282 U.S. 133 (1930). After *Smith*, a portion of these costs was allocated to the interstate jurisdiction. The basic "settlements" and "division of revenues"[1] process was in effect when the FCC initiated the CC Docket No. 78-72 rulemaking proceeding at issue here. Docket No. 78-72 originated February, 1978 with the issuance by the FCC of a *Notice of Inquiry and Proposed Rulemaking*, 67 F.C.C.2d 757 (1978), designed to determine the MTS/WATS[2] market structure that would best serve the public interest. In its

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[1]"Settlements" refer to the method used by AT&T and the independent local telephone companies. "Division of revenues" refers to the method used within the AT&T corporate family.

[2]MTS is the FCC's name for standard long-distance telephone service. WATS provides a subscriber with access from his line to all phones in each of several geographic zones. 800 Service (formerly Inward WATS) enables him to receive long-distance telephone calls without the caller being charged. Outward WATS enables him to place long distance telephone calls for less than standard long-distance rates.

Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 F.C.C.2d 177 (1980), the FCC concluded that a general policy of open entry in the MTS/WATS market would be in the public interest. In light of this conclusion, the Commission determined that future proceedings in Docket No. 78-72 would be confined to a determination of how local telephone companies should be compensated for the use of their facilities to complete interstate communications.

In response to comments received on its tentative proposals, the FCC, on February 28, 1983, issued its *Third Report and Order,* 93 F.C.C.2d 241 (1983) (*Access Charge Order*). In this order the Commission stated that in deciding upon a compensation plan, it sought to accommodate four potentially conflicting goals. The four objectives identified by the FCC were "the prevention of uneconomic bypass;"[3] "the elimination of unjust discrimination or unlawful preferential rates;"[4] "the encouragement of network efficiency;" and, "the continued assurance of universal service."[5] *Access Charge Order,* para. 122, 93

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[3]Bypass is the term used to describe what occurs when end users employ alternative technologies to take the place of the local exchange telephone system. The FCC feared and sought to avoid uneconomic bypass. Uneconomic bypass occurs when alternative technologies are cheaper to use only because use of the local exchange system is priced above cost. *NARUC v. F.C.C., supra,* at 1108.

[4]Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), makes unlawful any "unjust or unreasonable discrimination in charges. . ." and "any undue or unreasonable preference or advantage to any particular person. . . ."

[5]Section 151 of the Communications Act of 1934, 47 U.S.C. § 151, required the FCC to "regulate interstate . . . commerce in communication . . . so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide and worldwide . . . communication service with adequate facilities at reasonable charges."

F.C.C.2d at 278. The FCC determined that its various goals could be accomplished best by moving toward a system in which virtually all costs associated with the local loop were recovered from end users through monthly flat-rate access charges.

The FCC has twice reconsidered its *Access Charge Order* and the compensation scheme embodied in that order. In its *Memorandum Opinion and Order on Reconsideration,* issued August 22, 1983, 48 Feb. Reg. 42,984 (*Reconsideration Order*), the FCC altered several aspects of its prior decision, including the level of end user access charges. In its *Memorandum Opinion and Order on Further Reconsideration,* issued February 15, 1984, 49 Fed. Reg. 7,810 (*Further Reconsideration Order),* the Commission again modified several important aspects of its prior scheme, including the level and timing of end user access charges. More specifically, the FCC deferred end user charges for residential and single-line business customers until June, 1985[6] and capped these charges at $4 per month through 1990.[7] However, the FCC throughout its reconsideration proceedings, reaffirmed its conclusion that end user access charges should ultimately be imposed as the means to recover the bulk of NTS costs previously allocated to the interstate jurisdiction.

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[6]Multi-line business access charges, beginning at $6 per month, remained unaltered by the FCC's reconsideration orders. These charges were implemented on May 25, 1984.

[7]The FCC has also instituted further decision-making on several matters: the amount of end user charges after 1990; exemptions from access charges for low income subscribers; the timing of increases in end user charges; and, mechanisms to fulfill the particular needs of small telephone companies in high cost areas. *Further Reconsideration Order,* paras. 15-26, 49 Fed. Reg. 7,812-13.

The NARUC filed its petition for review [Docket No. 83-1225] pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(i) in the U.S. Court of Appeals for the District of Columbia Circuit on March 1, 1983, after the FCC released its *Third Report and Order.*

The Florida Public Service Commission intervened in Case Nos. 83-1225 and 83-1329. The FPSC alleged:

> IX. THE FCC's END USER ACCESS CHARGE VIOLATES THE UNIVERSAL SERVICE MANDATE OF THE COMMUNICATIONS ACT.
>
> A. The universal service mandate requires that FCC action promote the economic availability of telephone service to the greatest number of Americans.
>
> B. The record below does not support adoption of an end-user charge as the least burdensome means to promote universal service.
>
> C. The determinations made by the District Court in the AT&T divestiture proceeding collaterally establish that the end-user charge is antithetical to universal service.
>
> X. THE INTERSTATE END-USER ACCESS CHARGE VIOLATES ESSENTIAL PRINCIPLES OF JURISDICTIONAL SEPARATIONS ENUNCIATED IN *SMITH V. ILLINOIS BELL TELEPHONE COMPANY* AND EMBODIED IN THE JURISDICTIONAL PROVISION OF THE COMMUNICATIONS ACT.
>
> A. An interstate end-user access charge is prohibited under *Smith v. Illinois Bell Telephone Company.*
>
> B. An interstate end-user access charge consti-

tutes a local rate which is beyond the jurisdictional ambit of the FCC.

The Circuit Court affirmed the decision of the FCC in most major aspects. Reconsideration was filed and disposed of, *NARUC v. F.C.C., supra,* and this Petition ensued.

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COMMUNICATIONS COMMISSION HAS EXCEEDED ITS LEGISLATIVE GRANT OF AUTHORITY IN IMPOSING AN "END USER ACCESS CHARGE" AND AS SUCH HAS ACTED IN AN *ULTRA VIRES* MANNER.

The Federal Communications Commission exceeded its legislative grant of authority by imposing an across the board flat rate end user charge on all subscribers of local service. By such action, the Commission has acted in an *ultra vires* manner under the guise of characterizing what is really a local rate as a component of long distance interstate charges. The authority to set local rates is reserved to the states under the Communications Act of 1934 and the Commission has intruded upon that authority by imposing an end user charge.

Overview of Rate Making

In order to demonstrate how the Commission exceeded its authority and how it departed from the methods of ratemaking recognized by this Court in *Smith v. Illinois Bell Telephone, supra,* it is helpful to review the basic procedures followed in the setting of rates.

Within any jurisdiction, state or federal, a regulated

business must establish several things in order to justify a change in rates. It must first prove its investment (the amount of the investment and that the investment was prudently incurred). It must then establish its cost of operation (operating and maintenance expenses including taxes and depreciation) and what it believes investors expect as a return for their investing and bearing the financial and business risks associated with that investment. From this data, the regulatory agency computes a revenue requirement for the Company. A revenue requirement is an estimate of the amount of gross income which would compensate the utility for its prudent costs or expenses (including debt service) and produce sufficient dollars to satisfy the needs associated with attracting and keeping equity investors. Once this revenue requirement has been established, the agency has completed the first step in its process.

The second step begins with the agency gathering data on projected usages of each type of telephone service. Then, by balancing the costs of service and the value of such services, the agency goes about allocating this revenue requirement through the rates to be charged to various customers. This second step is generally termed the exercise of the agency's "rate structure jurisdiction." In determining the shape or the structure of rates, agencies are guided in their development by the projections of usage, by the elasticity of the demand for the service, the effects that rate increases will have on that demand and, finally, by social and economic considerations, such as the value of service to customer classes, the costs of providing that service and the number of phones accessed.

The system seems straight-forward enough, and it would be if the companies' activities were exclusively within the province of one jurisdiction. Generally, the

complexity of providing utility services prevents this simple situation. Telephone companies must, of necessity , provide both intrastate and interstate calling services. Electric utilities are tied into wholesale and retail sales and interstate transmission and sale of excess capacity. Each activity has a jurisdictional forum in which regulatory oversight and rate making is carried out. The difficulty in carrying out these regulatory functions is further complicated by the fact that some of the facilities used in the provision of service within one jurisdiction are also used for the provision of service in another jurisdiction. These "joint" facilities have to be equitably divided and allocated between the regulatory jurisdictions. The rates set, based upon that division, must assure that the rate bases upon which a utility earns and expenses allocated to the provision of that service, adequately compensate the utililty for the total plant used and useful in the provision of utility services.

So, into the regulatory scheme an additional step is added. *Before* a regulatory agency undertakes rate making, there must be a division of costs for joint facilities and an allocation of those costs to the appropriate jurisdiction. An agency, in this case the FCC, prepares a jurisdictional separation of plant and an assignment of the plant and associated expenses to the jurisdiction having the authority for setting rates to recover those costs from the ultimate ratepayers.

Jurisdictional Separation — Effect of Smith Decision

The separation of plant between jurisdictions was the underlying concern in the *Smith* case. In *Smith,* the state commission set rates without regard to a division of the Company's assets along jurisdictional lines. The state commission and the District Court that reviewed the order

both agreed that intrastate and interstate calls were made using the same equipment. However, the state commission "made no specific findings based on a separation of the intrastate and interstate property, revenues and expenses. Rather, the state commission determined the issue on the basis of the total Chicago property of the company." *Id.* at 147.

This Court held that:

> The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. *It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.* . . .
>
> . . . *The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority.* In view of the questions presented in this case, *the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed.* (emphasis supplied).

Clearly, before rate setting can begin, a proper allocation of assets and expenses must be made between jurisdictions in order to ensure that the rates set by the federal and state jurisdictions properly reflect the costs and assets of providing service.

The FCC Has Intruded Upon State Authority To Set Local Rates

In this case, the Commission properly recognized that its jurisdiction could be exercised to determine the appropriate separations of investment and expenses between jurisdictions. However, the Commission exceeded its authority by designing a rate structure for the recovery of the intrastate revenue requirement. In order to compensate for its lack of jurisdiction, the Commission created a fiction that the end user access charge was an interstate rate.

The Commission decided that non-traffic sensitive (NTS) costs associated with the local loop, previously allocated to interstate toll, should be borne instead entirely by the local subscriber. In effect, the Commission reallocated the NTS cost from interstate to local.

In defining end user access charges as a component of interstate communications, the Commission intentionally ignores the controlling fact that if a subscriber never uses the interstate network he must still pay an end user access charge. Stated another way, a person who simply subscribes for local exchange service must pay the end user access charge. The end user access charge is thus a local rate within the jurisdiction of the state regulatory agency's authority to design pursuant to its rate structure jurisdiction.[8] What the FCC has engaged in is "administrative legislation." The Commission has taken upon itself the role of redefining its jurisdiction to limit the jurisdiction of the individual states in matters of rate structure for local rates. Jurisdiction over intrastate activities is expressly reserved to the state in section 47 U.S.C. §§ 152(b) & 221(b), while the Commission has authority over interstate

[8] In Florida, this authority is found in §§ 364.03, *et seq.* (1983).

and international communications pursuant to 47 U.S.C. § 151. As long as the FCC contents itself with separating costs between jurisdictions and reserves to the States the right to allocate those costs through state rate setting, the Commission has not exceeded its authority.

Nature Of Costs Involved

In American Telephone and Telegraph Company's Brief in Opposition to the Petition for Writ of Certiorari filed in this Court in Case 84-95, AT&T alleges "[i]n this case, the fixed end user charges adopted by the FCC are *interstate* rates limited to recovering costs assigned to *interstate* jurisdiction" (*Brief* at 8). At the same time, in testimony before the Florida Public Service Commission, on September 25 and 26, 1984, in Docket No. 820537-TP, witnesses for AT&T Communications stated the converse.

Dr. John T. Wenders,[9] called on behalf of AT&T Communications in response to questions posed by Commissioner Joseph P. Cresse, stated:

> A You're talking about a carrier or an end user now?
>
> Q From an end user's perspective, what are NTS costs to that person?
>
> A They are local costs.
>
> Q Are they a cost merely of access to the local network?
>
> A Yes, sir, mostly.

---

[9]Dr. Wenders is a Professor of Economics at the University of Idaho. He was testifying on behalf of the AT&T of the Southern States, Inc., in Docket No. 820537-TP. In the Matter of Intrastate Telephone Access Charges for Toll Use of Local Exchange Services at 1194-1195.

Q You said most of them. Where is the split?

A Well, there are some in the switching equipment that are dedicated nontraffic-sensitive costs in the switching equipment that could not properly be termed part of the loop, I suppose. We may be quibbling about words.

Q Is the perception of the end user, for example the residential customer, relevant to this Commission's considerations as to how these costs should be priced?

A Well, obviously, the Commission, as Mr. Cresse indicated, the Commission feels pressures. They have political pressures on them, and I would be a fool to admit that those things didn't exist there. *The thing that bothers me about it is that we have fostered among local users somehow the fiction that local rates are covering their costs and we all know they're not. And so that their perception of so-called CALC*[10] *is that it is something that has something to do with toll. It really doesn't. That's only the way the FCC did it. Because of the separations problem that transferred those costs artificially from local to toll, then the FCC is putting them back on local. Somehow the customer has the perception that they're coming from the FCC. That's not true.* (emphasis supplied).

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[10]N.B.: CALC is an acronym for "Customer Access Line Charge" and is synonymous with the flat end user fee. Brief of Mountain States Telephone Company and Pacific Northwest Bell Telephone Company in Case No. 84-95, *NARUC v. F.C.C.* on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 3.

In further testimony, also in response to Commissioner Cresse's questioning, Lawrence R. Weber, Regional Vice President, called on behalf of AT&T Communications of the Southern States, Inc., (at 977-978), stated:

> COMMISSIONER CRESSE: The second thing I want to ask you, do you think there is any difference between a CALC and an increase in local rates?
>
> WITNESS WEBER: No, sir. I think an increase in local rates is preferable, personally. I think we ought to deal with separations problems, which is what we are dealing with. A CALC, I think the CALC came about because of a failure of the joint board over the years to move and –
>
> COMMISSIONER CRESSE: For all practical purposes, it is an increase in local rates, isn't it?
>
> WITNESS WEBER: It amounts to the same thing to the guy that is paying it.
>
> COMMISSIONER CRESSE: Thank you, sir. (at 1095).

Effect Of FCC *Ultra Vires* Action

It is obvious from this testimony that the CALC or end user access charge is nothing more than an increase in local rates. Furthermore, it has no relationship to actual costs nor has the FCC tried to tie it to actual costs. The FCC has allocated what are local costs back to the local customers and then specifically set the form for charges to recover those costs without regard to its lack of jurisdiction over local rates.

This Court must act to limit the unbridled extension of the FCC authority into traditional state rate regulation.

> Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.[11]

As a policy matter, the issue presented for consideration by this Court is of significant social interest. State regulatory authorities are governed by public interest standards set by state legislatures to govern the design of rates. These interests primarily concern local differences in classifications of customers and considerations unique to states. State agencies design rate strucures tailored to local costs and usages. There is no overriding federal policy governing local rate structure issues.

The argument has been raised that the function of the end user access charge is to allocate the cost to the cost causer. American Telephone and Telegraph Company in their Brief in Opposition to the Petition for Writ of Certiorari filed by the National Association of Regulatory Utility Commissioners, Case No. 84-95, states:

> Under the FCC's new plan, the non-traffic sensitive customer line costs assigned to the FCC's jurisdiction will be recovered in part from telephone customers through flat monthly charges, *thus ensuring that the interstate costs of a customer's line are borne by the actual cost causer.* At 3. (emphasis supplied).

The test being employed by state regulatory agencies in trying to allocate cost causation is the allocation of the costs to the customer who uses the service.

---

[11] *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936).

The Circuit Court, citing from the *Access Charge Order,* para 121, 93 F.C.C. at 278, further iterated:

> "A subscriber who does not use the subscriber line to place or receive calls imposes the same NTS (non traffic sensitive) costs as a subscriber who does use the line." The Court added, "It should be the main rule, the FCC decided, that subscribers bear responsibility for the *local telephone network costs they actually cause."* (emphasis supplied).

NARUC v. F.C.C., supra, at 1108.

Once the FCC decided upon the costs associated with the "local telephone network costs," it was then within the jurisdiction of the state regulatory agencies to design rate structures for the recovery of those costs. The Circuit Court has in effect legalized an *ultra vires* exercise of administration prerogative absent any applicable statutory authority. The argument proceeds that although these are local telephone network costs, to be collected from all local ratepayers, regardless of the fact that a ratepayer *never* uses the interstate network, and the funds will be received by the local companies to support local plant, the Commission and the Court avow that these are interstate rates.

The Commission in its order, *Access Charge Order,* paras. 37-41, *Section 201(a) Authority*, predicates its imposition of a local rate on the fact that the access charge is to compensate for disparities in the division of revenues. The disparity, the Commission alleges, is that certain NTS costs of the local exchange company which are associated with the provision of long distance (interstate) service, have been traditionally recovered through the separations process. Now it determines that these charges should be assessed uniformly from the local ratepayer.

This is a mischaracterization of the nature of the costs involved. The costs are local costs to be recovered through local rates. The FCC has intruded into traditional state rate making in excess of its legislative grant of authority. This Court should take jurisdiction.

II.

THE FCC'S ACCESS CHARGE VIOLATES THE UNIVERSAL SERVICE MANDATES OF THE COMMUNICATIONS ACT IN IMPOSING A BURDENSOME, DISCRIMINATORY RATE FOR THE CONVENIENCE OF AGENCY ADMINISTRATION.

The Commission's action in authorizing a uniform end user access charge was arbitrary and capricious and, therefore, in violation of the prohibition against unjust or unreasonable discrimination in rates prohibited by 47 U.S.C. § 202. *Nader v. F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975). The end user charge bears no relationship to actual cost and the decision does not support any of the considerations it attempted to apply. *Ad Hoc Telecommunications Users Committee v. F.C.C.*, 680 F.2d 790 (D.C. Cir. 1982).

End User Charge Bears No Relation To Cost

The only justification for the imposition of the uniform end user access charge is the dubious distinction of ease of administration.

Each utility must justify its rates based upon its individual expense characteristics and the costs of debt and equity capital it has received in the market. Local rates are different for like communications services around the country and within any state. In Greenwich, Connecticut, a subscriber pays $16.88 for local service. A two dollar per month increase in that service amounts to only an 11.8

% increase in rates.[12] In Florida for like communications services, in Miami, a ratepayer with Southern Bell can expect to pay $12.20 per month[13] for local exchange service[14] while a ratepayer with the United Telephone Company in Boca Grande, will pay $4.73 per month[15] for local service. One of the considerations besides costs and investment is calling scope and telephone densities. By applying a uniform end user access charge to both of these like communications services without regard to differences in cost, the FCC has imposed a discriminatory rate increase on local rates without any jurisdiciton, save its own agency's convenience. *American Broadcasting Co., Inc. v. F.C.C.*, 663 F.2d 133 (D.C. Cir. 1980).

For the New York Telephone Company ratepayer a $2 per month increase amounts to a monthly increase of 11.8% in local rates, whereas for the United Telephone Company ratepayer it amounts to a 42.3% increase in local rates. There is no relationship between these percentage increases and costs associated with the provision of like communications services.

The state agencies, charged with the responsibility of setting local rates (by both state and federal statutory authority), properly consider these and other factors in

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[12] New York Telephone Company, Compliance Tariff filing, October 22, 1984, § 1, 2d rev. p. 1. At other locations within Connecticut, local rates vary as well. In Ansonia, Connecticut, the charge for local service is $9.81 and for Hartford, the same service is $12.40. Southern New England Telephone Company Tariffs, Part X, § 2, sheets 2 & 7, respectively.

[13] Southern Bell Telephone Company Tariff A3.4.2B, pp. 12-16 – Miami, Homestead, North Dade and Perrine, Florida.

[14] The analogous situation exists for the multiline business access charge now in effect.

[15] United Telephone Company Tariff A3.C.2., pp. 10 & 11 – Boca Grande, Everglades and Moore Haven, Florida.

allocating the costs of the provision of that service to the cost causers. The costs of providing local service vary with location and with each company providing the service.[16] Even within companies, the costs vary between locations served. The FCC is having difficulties in setting equitable end user access charges simply because it does not have, nor could it ever expect to have, the knowledge and information available to the state regulatory agencies for the setting of equitable local rates. The FCC acknowledges that it requires the technical assistance of the state regulatory commissions to assist in setting the returns on equity for the more than 1400 exchange telephone companies.[17] Yet in this proceeding, the agency is affecting the tens of thousands of local rates involved for each of these same 1400 local telephone companies. The agency assumes inconsistent positions to suit its convenience. Further, in this same request for comments on the rate of return, the

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[16]The calculation and allocation of costs is complicated by the age of the financial and physical investments as well as calling areas. For example: In Florida, for ALLTEL, Tariff A3.3.1 pp. 3 & 4, in Ft. White with a calling scope of 6,411 phones, the monthly local charge is $9.20. For United Telephone Company, Tariff A3.C.2. pp. 10 & 11, in Sebring with a calling scope of 14,535 phones, the local rate is $5.65. Hence, it is readily apparent that there are no direct or simple relationships between costs and local service.

[17]In its *Notice of Proposed Rulemaking* in CC Docket No. 84-800, FCC 84-395, the following statement appears:

> "4. But, these changed conditions potentially create an administrative quagmire for the industry and for this agency. We do not have the resources to conduct over 1,400 rate proceedings on a company-by-company basis with oral hearings frequently enough to keep up with changing financial and industry circumstances. (Notice of Proposed Rulemaking: Authorized Rates of Return for the Interstate Service of AT&T Communications and Exchange Telephone Carriers, 49 Fed. Reg. 32,871 (1984))."

agency asks for the remedy which the States are advocating in this case.[18]

Realizing that the agency could not determine the returns on equity for the 1400 local companies, the FCC is seeking help from the States. When it attempts to allocate local costs associated with the local loop, the FCC ignores the States and implements a rate structure for its own convenience having no relation to cost, rebuffing the States' expertise and resources. It is dismaying to note that when the issue is the accuracy of a company's return on equity, the FCC is concerned with surgical precision, but when the issue deals with the customers' rates, the FCC is instead, content with ease of administration.

It is not that the FCC has intentionally sought to deny local ratepayers equal protection of the law. It has stated a policy that the costs should be borne by the cost causers. The agency is, however, without the jurisdiction, the expertise and the industry to obtain the necessary local cost figure to assess who is the cost causer and assign the appropriate rates to those costs. What the agency has instead done is arbitrarily assign "costs" through a formula approach, by the use of an arbitrary allocation factor[19] uniformly across all local ratepayers without regard to actual cost. The reason for this action is the ease of administration and not a concern for costs. It is for just such a reason that the rationale of the *Smith* decision is still good law. It makes sense that the federal government should exercise its jurisdiction to oversee the assignment

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[18]"Commenters may suggest methodologies different than a formula approach, *such as use of the rates of return allowed by state commissions. See MTS and WATS Market Structure, supra,* 93 F.C.C.2d at 316, n. 102." *Id.* at 32,871.

[19]See Note 17.

of costs between jurisdictions, but it then should fall upon the state regulatory agencies to allocate those local costs to local ratepayers based upon the local cost characteristics for each location and local exchange company.

> "One of the dangers of extraordinary experience is that those who have it may fall into the grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable can in fact be overcome by fresh, independent minds."[20]

The states have the expertise, the jurisdiction and the resources to allocate local costs appropriately to local ratepayers.

Smith has as its basis, the allocation of property between interstate and intrastate services based upon the actual use to which the property was put. The FCC has now changed that standard with the Circuit Court's acquiescence. The FCC has failed to even assert that there is any reasonable basis for apportionment of the cost associated with access and the across-the-board flat-rate end user access charge.

Here it is acknowledged by the FCC, that its allocation of the local exchange costs through the use of an end user access charge is arbitrary, but that the system is too complicated for precise determination. One cannot give deference to an agency decision when that decision is patently discriminatory and has the fundamental consequence of undermining any assurances that there will be universal telecommunications services as mandated by the Communications Act of 1934.

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[20]Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 64 Harv. L. Rev. 436, 471 (1954), citing from Judge Wyzanski.

The FCC's Decision Is Not Supported By Espoused Policy Considerations

In deciding to authorize a uniform end user access charge, the FCC allegedly considered four factors which it espoused in its order authorizing the charge. It contended that:

1. Its decision would continue to assure the availability of universal service (at affordable prices);
2. the imposition of its decision would eliminate unjust discrimination or preferential rates;
3. an end user charge would encourage network efficiency; and
4. prevent uneconomic bypass of the local exchange network.

Access Charge Order, para. 122, 93 F.C.C.2d at 278.

The Commission's decision does not support any of the considerations it attempted to apply. As such, the imposition of the customer access line charge in this case constitutes arbitrary agency action which is violative of equal protection for the consuming public and in direct conflict with the provisions of the Communications Act of 1934.

1. The charge is regressive and does not continue to assure the availability of universal service.

Fundamentally, the decision to impose an end user charge increases local rates and is in the nature of a regressive charge affecting those customers least able to pay the charge, the residential customer. Any flat rate increase in taxes or charges has a regressive effect on the small user, the poor and those least able to afford alternatives. See: *Geduldig v. Aiello,* 417 U.S. 484, 493 (1974).

Thus, the goal of continuing to assure universal service is not achieved by the FCC's choice.

2. The end user access charge is patently discriminating.

A flat rate increase, suggested by the FCC has disproportionate effects on different ratepayers. As demonstrated earlier, for some ratepayers the increase in rates would be 11.8%, whereas, the same flat rate increase could be as high as a 42% increase. The increase would have no basis nor support from the cost of providing the service. Therefore, the rate is patently discriminatory. Rates can be discriminatory, but the discrimination in rates must have some factual justification. *Nader, supra,* at 201. The only justification advanced by the FCC is that the agency cannot justify the differential based on costs, so it has taken the approach of ease of administration. As such, the agency has violated 47 U.S.C. § 202(a).

3. End user charge encourages bypass.

To understand how a flat rate end user charge discriminates against the small user and encourages bypass, it is necessary to consider demand elasticity. As the cost for a service increases, the demand for that service declines. The more the service is in the nature of a necessity, the less the demand will decline. However, as the cost for the service increases, the availability of alternatives to that service becomes more economically competitive, and, thus, viable alternatives.

A classic example of such a bypass phenomenon is the case of cable television service. The availability of cable services in remote or primarily rural areas simply is not cost justified and, consequently, not available. As a result,

alternative services are available through the purchase of satellite dish antennae. A rural homeowner will bypass the high cost of rural cable service or the lack of rural cable services by investing in bypass technology. Once the rural resident invests in a dish antenna, each month he avoids paying for cable service he is, in effect, getting a return on his investment in that dish. Once he "recovers" the cost of the dish, he continues to avoid paying for comparable cable service. This avoidance of paying for service is effectively a return on his investment.

Once a subscriber of local telephone service invests in bypass technology, he is no longer interested in using or returning to local service.

As the costs of local service go up, large users are encouraged to seek economically justifiable alternative services. Since phone service is in the nature of a necessity, large users look to alternatives because they have an economic incentive to bypass the local network.

> Under the FCC's plan to shift most subscriber plant costs in the interstate jurisdiction onto end users, a $6 end user charge will be imposed on multi-line business customers starting in June 1984.

NARUC v. F.C.C., supra, at 1109.

The current state of technology offers the hardware for that bypass and the FCC offers them the economic incentive to purchase that equipment.

4. The FCC's decision idles the system and encourages inefficiency.

As large users purchase bypass equipment and abandon the local network, there is not a corresponding decrease in

the facilities required to maintain a local exchange network. Those fixed facilities require a return on investment through depreciation expense and a return on that investment to compensate investors for their bearing the risk of originally building those systems. In addition, those systems must be maintained so that any person seeking to avail himself of those services has the opportunity to do so. The result is to allocate these fixed costs, or as the FCC termed these costs, non-traffic sensitive costs, to fewer customers. When you allocate a fixed level of costs to fewer customers local rates must go up. As fewer and fewer customers bear the cost of maintaining the local exchange system, local rates are again forced up. This ultimately endangers the very existence of the local exchange network. The residential consumer has no economically justifiable alternative to the provision of local exchange services. This unjustified discrimination in rates is the auto-da-fé of universal service.

The irony of the Commission's decision lies in the interplay of local and long distance rates. The Commission's decision would reduce long distance rates and increase local rates. Increasing the cost of the provision of local service will discourage the use of the service necessary to access the long distance service. This discouraging result is in direct derogation of the Communications Act and the FCC's responsibility mandated by the Act. The Commission's decision simply encourages network inefficiency.

The FCC Has Acknowledged That the Charge May Not Accomplish Goals

The FCC and the Court acknowledge that the flat rate end user charge may not accomplish the intended goals; however, the charge will, nonetheless, be imposed.

The Commission would have this Court believe that the four enumerated criteria for the setting of this end user access charge should govern as some form of overriding national policy. The states on the other hand believe that they are in a better position to set rate structures on a local basis carrying out the national policy of protecting universal service. Rate structure has been and continues to be a matter of great local interest.

The technology of bypass is certainly a national technology. However, the application of that technology to individual concerns is a matter of local interest and each decision to bypass or not to bypass is based upon local economic interests. It is these local economic interests which state regulatory agencies grapple within each rate case. The Commission has acknowledged that it is unsure that the remedy it has imposed and deferred imposing may not be the best solution and that further study is necessary. The reason that the problem is so complex is that the problem is local in nature requiring surgical precision in fashioning a remedy that has intricate complexity. Thousands of local rates and rate structures will be irreversibly altered if the FCC is allowed to interfere with local rate structures. This Court should accept jurisdiction.

The FCC Justification For Its Action Is Misplaced

The Commission would probably attempt to justify this intrusion on the authority of *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976). In *NCUC*, the Commission deregulated the charges for customer-provided equipment and the interconnection of that equipment to the nationwide communications network. The regulation of that equipment was restricted exclusively to intrastate communications and, as such, ostensibly outside the jurisdic-

tion of the FCC. The Court found that the interconnection with telephone company equipment affected access to the interstate telephone system and was a permissible exercise of the Commission's jurisdiction under 47 U.S.C. § 201(a). The Court stated that when there are inconsistent policies between the state and federal regulatory agencies and when the federal policies did not interfere with the integral operations of the state government (state's rights argument), the policy was exercisable under the federal commerce power. The Court found in *NCUC* that the use of terminal equipment was indistinguishable for the provision of interstate or intrastate calls. Here the costs are admitted by all to be local in nature and are, therefore, *distinguishable* from the costs associated with the provision of interstate calls.

In *NCUC,* the FCC was instituting a national policy that was predicated on the fact that terminal equipment had established itself as a competitive market. It was no longer in the public interest to expend public funds to regulate the sale of terminal equipment. The FCC was not imposing a rate increase, but was in fact removing state and federal rate regulatory authority from the sale and leasing of terminal equipment. Contrasted with this case, the FCC is imposing rate regulation on all customers of local intrastate telephone service without regard to the differences in costs and types of services offered in the thousands of service areas around the country. The FCC is imposing a flat, across-the-board increase without regard to its own limitation on jurisdiction and expertise and without any overriding national policy. There is no national policy favoring a discriminatory rate increase for subscribers of local service.

There is a significant distinction between the exercise of authority implicitly within the mandates of 47 U.S.C. §

201(a), and exercise of authority which amounts to usurpation of authority acknowledged by this Court to exist in the States.

CONCLUSION

The Federal Communications Commission has designed an "end user access charge" to be applied on all local ratepayers. The effect of this charge is to increase local rates for consumers regardless of whether they use interstate service or restrict their usage of the phones to local service. The action of the FCC is in excess of the Commission's authority and, as such, constitutes an *ultra vires* act not cognized in the Communications Act of 1934, at 47 U.S.C. §§ 201(a) & 205.

The Federal Communications Commission in acting in an *ultra vires* manner, has imposed local rate increases which are discriminatory and, as such, violate the prohibition against discriminatory rates found in 47 U.S.C. § 202. The action endangers the continued availability of universal service.

Respectfully submitted,

WILLIAM S. BILENKY
General Counsel
(Counsel of Record)

Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

DATED: November 21, 1984

APPENDIX A

STATUTES & REGULATIONS

47 U.S.C. § 151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 201(a)

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such

charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 202

(a) Prohibition of unjust or unreasonable discrimination. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 221(b)

(b) State jurisdiction over service. Subject to the provisions of section 301 [47 USCS § 301], nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

APPENDIX B

FLORIDA STATUTES

364.03 Rates to be reasonable; performance of service; maintenance of facilities and equipment.

(1) All rates, tolls, contracts, and charges of, and all rules and regulations of, telephone companies for messages, conversations, services rendered, and equipment and facilities supplied, whether such message, conversation, or service is to be performed over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable, and sufficient, and the service so to be rendered any person by any telephone company shall be rendered and performed in a prompt, expeditious, and efficient manner and the facilities, instrumentalities, and equipment furnished by it shall be safe and kept in good condition and repair and its appliances, instrumentalities, and service shall be modern, adequate, sufficient, and efficient.

(2) Every telephone company operating in this state shall provide and maintain suitable and adequate buildings and facilities therein, or connected therewith, for the accommodation, comfort, and convenience of its patrons and employees.

(3) Every telephone company shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communications and furnish telephone service as demanded upon terms to be approved by the commission.

364.035 Rate fixing; criteria service complaints.

(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls or rentals to be observed and charged for service within the state by any and all telephone companies under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered, including energy conservation and the efficient use of alternative energy resources; the value of such service to the public; and the ability of the telephone company to improve such service and facilities; except that no telephone company shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings. In its consideration thereof, the commission shall have authority, and it shall be the commission's duty, to hear service complaints, if any, that may be presented by subscribers and the public during any proceedings involving such rates, charges, fares, tolls, or rentals; however, no service complaints shall be taken up or considered by the commission at any proceedings involving rates, charges, fares, tolls, or rentals unless the telephone company has been given at least 30 days' written notice thereof, and any proceeding may be extended, prior to final determination, for such period; and, further, no order hereunder shall be made effective until a reasonable time, considering the factor of growth in the community and availability of necessary equipment, has been given the telephone company involved to correct the cause of service complaints.

(2) The power and authority herein conferred upon the commission shall not cancel or amend any existing punitive powers of the commission but shall be sup-

plementary thereto and shall be construed liberally to further the legislative intent that adequate service be rendered by telephone companies in the state in consideration for the rates, charges, fares, tolls, and rentals fixed by the commission and observed by the telephone companies under its jurisdiction.

364.05 Changing rates, tolls, rentals, contracts, or charges.

(1) Unless the commission otherwise orders, no change shall be made in any rate, toll, rental, contract, or charge which has been filed and published by any telephone company in compliance with the requirements of s. 364.04, except after 60 days' notice to the commission and the publication for 60 days as required by that section in the case of original schedules, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rate, toll, rental, contract, or charge will go into effect. All proposed changes shall be shown by printing, filing, and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

(2) The Commission, for good cause shown, may allow changes in rates, tolls, rentals, contracts, or charges without requiring the 60 days' notice and publication herein provided for by an order specifying the change so to be made, the time when it shall take effect, and the manner in which the same shall be filed and published.

(3) When any change is made in any rate, toll, rental, contract, or charge, the effect of which is to increase any rate, toll, rental, contract, or charge then existing, attention shall be directed on the copy filed with the commis-

sion to such increase by some character immediately preceding or following the item in such schedule, which character shall be in such form as the commission may designate. No change shall be made in any rate, toll, rental, contract, or charge prescribed by the commission without its consent.

(4) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the telephone company requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to may, at the option of the company, go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such telephone company to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such telephone company to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the telephone company shall be refunded or disposed of by the telephone company as the commission may direct; however, no such funds shall accrue to the benefit of the telephone company. The commission shall take final commission action in the docket and enter its final order within 12 months after the commencement date for final agency action. As

used in this section, "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the telephone company has filed with the clerk the minimum filing requirements as established by rule of the commission. Within 30 days after receipt of the application, rate request, or other written document for which the commencement date for final agency action is to be established, the commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiencies to the applicant, specifically listing why the applicant has failed to meet the minimum filing requirements. The statement of deficiencies shall be binding upon the commission to the extent that, once the deficiencies in the statement are satisfied, the commencement date for final agency action shall be promptly established as provided in this section. Thereafter, within 15 days after the applicant indicates to the commission that it believes that it has met the minimum filing requirements, the commission or its designee shall either determine the commencement date for final agency action or specifically enumerate in writing why the requirements have not been met, in which case this procedure shall be repeated until the commencement date for final agency action is established. When the commission initiates a proceeding, the commencement date for final agency action shall be the date upon which the order initiating the proceeding is issued.

364.14 Readjustment of rates, charges, tolls, or rentals; hearing; order compelling facilities to be installed, etc.

(1) Whenever the commission finds, upon its own motion or upon complaint, that the rates, charges, tolls, or

rentals demanded, exacted, charged, or collected by any telephone company for the transmission of messages by telephone, or for the rental or use of any telephone lines; any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance, or device; or any telephone extension or extension system, or that the rules, regulations, or practices of any telephone company affecting such rates, charges, tolls, rentals, or service are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls, or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order as hereinafter provided. In prescribing rates, the commission shall allow a fair and reasonable return on the telephone company's honest and prudent investment in property used and useful in the public service.

(2) Whenever the commission finds that the rules, regulations, or practices of any telephone company are unjust or unreasonable, or that the equipment, facilities, or service of any telephone company are inadequate, inefficient, improper, or insufficient, the commission shall determine the just, reasonable, proper, adequate, and efficient rules, regulations, practices, equipment, facilities, and service to be thereafter installed, observed, and used and shall fix the same by order or rule as hereinafter provided.

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Nos. 84-816, 84-824, 84-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES *
THOMAS R. GIBBON
THEODORE D. KRAMER
HALEY, BADER & POTTS
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-0606

* Counsel of Record

January 7, 1985

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
CONCLUSION	7
APPENDIX	A-1

TABLE OF AUTHORITIES

JUDICIAL DECISIONS	Page
Lincoln Tel. and Tel. Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981)	5
National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984)	4
Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939)	5
United States v. Western Electric Co., 569 F. Supp. 1057 (D.D.C. 1983)	6
United Telephone Co. of the Carolinas v. FCC, 559 F.2d 720 (D.C. Cir. 1977)	4
Wheeler v. Barrera, 417 U.S. 402, 94 S.Ct. 2274, 41 L.Ed.2d 159 (1974)	6
ADMINISTRATIVE DECISIONS	
Application of GTE and SPCC and SPSC, 94 FCC 2d 325 (1983)	6
MTS and WATS Market Structure (CC Docket No. 78-72) (Third Report and Order), 93 FCC 2d 241 (1983), *reconsidered* 54 Rad. Reg. 2d (P&F) 615, 48 Fed. Reg. 42984 (September 21, 1983), further reconsidered, 55 Rad. Reg. 2d (P&F) 785, 49 Fed. Reg. 7810 (March 2, 1984), *aff'd in principal part sub nom. National Association of Regulatory Utility Commissioners v. FCC*, —— U.S. App. D.C. ——, 737 F.2d 1095 (1984), *pet. for cert.* No. 84-95 (filed July 18, 1984)	4
Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 95 FCC 2d 554 (1983)	6
United Telecommunications, Inc. and U.S. Telephone, Inc., 56 Rad. Reg. 2d (P&F) 547 (1984)	6
STATUTES	
47 U.S.C. § 152(b)	3, 6
47 U.S.C. § 153(u)	3
47 U.S.C. § 154(i)	5
47 U.S.C. §§ 201-205	2, 3, 4, 5

LIST REQUIRED BY RULE 28.1

The list required by Rule 28.1 may be found in MCI's August 17, 1984, Brief In Opposition to the petition for certiorari filed by the National Association of Regulatory Utility Commissioners, No. 84-95.

IN THE

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BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

Pursuant to Rule 22.1 of the Rules of this Court, respondent MCI Telecommunications Corporation ("MCI") opposes the petitions for certiorari filed by the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission, No. 84-816; the Florida Public Service Commission, No. 84-824; and the New York Public Service Commission, No. 84-856.

LIMITED PURPOSE OF THIS OPPOSITION

The petitions for certiorari in Nos. 84-816, 84-824 and 84-856 seek review of the D.C. Circuit's decision to uphold the FCC's end-user access charge plan. Many of the issues raised by the instant petitions were previously raised by the petitions filed in Nos. 84-95 *(National Association of Regulatory Utility Commissioners v. FCC)* and 84-504 *(National Association of Utility Consumer Advocates, et al. v. FCC)*. MCI opposed those earlier petitions in a Brief in Opposition filed on August 17, 1984 in No. 84-95.[1] MCI relies on the statement of the case and the argument made in that brief to oppose the instant petitions. Petitioners Wisconsin (No. 84-816) and New York (No. 84-856), however, have raised a new issue concerning the authority of the FCC to prescribe end-user access charges for "connecting carriers." This brief in opposition is directed to that issue.

STATEMENT OF THE CASE

MCI adopts the statement of the case presented in its Brief in Opposition, filed on August 17, 1984, in No. 84-95, *National Association of Regulatory Utility Commissioners v. Federal Communications Commission and United States of America, et al.*

SUMMARY OF THE ARGUMENT

There is no difference between the Commission's authority to order end-user charges for connecting carriers and its authority to order such charges for other carriers. Both connecting and non-connecting carriers are expressly subject to Section 205 of the Communications Act which provides ample authority to prescribe end-user charges.

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[1] MCI also relied upon that brief in opposing the petition filed in No. 84-504.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO PRESCRIBE END-USER CHARGES FOR CONNECTING CARRIERS

The Commission decided that all exchange telephone companies should use end-user charges to recover a substantial portion of the costs of non-traffic sensitive subscriber equipment allocated to the interstate jurisdiction. Petitioners allege that some exchange telephone companies are "connecting carriers" under the Communications Act[2] and that the Commission lacks authority to order such carriers to utilize end-user charges. The attempted distinction between end-user charges for connecting carriers and other carriers lacks merit. While "connecting carriers" are exempt from some of the provisions of the Communications Act, they are nevertheless expressly subject to the very provisions upon which the agency relied to order end-user charges.

Pursuant to Section 2(b) of the Act, 47 U.S.C. § 152(b), connecting carriers are expressly made subject to Sections 201 through 205, 47 U.S.C. §§ 201-205.[3] These sections generally provide that carriers shall furnish service upon reasonable request and that their charges and practices will be just and reasonable (Sec. 201); that it

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[2] "Connecting carriers" are carriers that are engaged in interstate or foreign communication solely through physical connection with the facilities of another unrelated carrier. *See* Sections 2(b) and 3(u) of the Communications Act, 47 U.S.C. §§ 152(b) and 153(u).

[3] Section 2(b), 47 U.S.C. § 152(b), states:

> ". . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . *except that sections 201 through 205 of this Act, both inclusive, shall except as otherwise provided therein, apply to carriers described in clauses (2), (3) and (4).*" (emphasis supplied)

shall be unlawful for any carrier to make unreasonable discrimination in charges (Sec. 202); that every carrier, except connecting carriers, shall file tariffs (Sec. 203); that the Commission may hold hearings upon the lawfulness of charges and practices (Sec. 204); and that the Commission after full opportunity for hearing may prescribe just and reasonable charges, classifications, regulations and practices. The Commission relied upon these sections of the Act, especially Section 205, to prescribe the end-user charges here at issue. *MTS and WATS Market Structure*, 93 FCC 2d 241, 254 *et seq.* (1983). Accordingly, the Commission's authority to prescribe end-user charges for connecting carriers under Section 205 of the Act stands on the same footing as the agency's authority to prescribe end-user charges for any other carrier. Because it could prescribe the use of such charges for non-connecting carriers,[4] it could also prescribe such charges for connecting carriers.

The only possibly arguable limitation upon the Commission's authority to prescribe end-user charges for connecting carriers is that Section 203 does not require that connecting carriers file tariffs with the Commission as it does for other carriers.[5] But Section 203 also does not prohibit the filing of tariffs by connecting carriers. It merely does not, of itself, mandate such filing. Section 203 envisions that the charges of connecting carriers for

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[4] *See* MCI's October 17, 1984, Brief in Opposition, filed in *NARUC v. FCC*, No. 84-95.

[5] Wisconsin asserts that connecting carriers are not subject to Section 201(a), citing *United Tel. Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977). That case, however, holds exactly the opposite. As stated by the court, Section 201 is inapplicable only if a carrier removes its interconnection with an interstate company and thereby removes itself from the connecting carrier class: "United and Carolina are free to remove their interconnection with Southern Bell and thereby also remove themselves completely from the jurisdiction of the Commission." 559 F.2d at 724. No telephone company carriers have chosen to remove their interconnection with the interstate network in this case.

interstate communications will be reflected in the tariffs of other carriers. As the court below stated, "[N]othing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205." 737 F.2d at 1115, n. 23. Even if the Commission's authority under Section 203 were somehow limited by Section 203's connecting carrier exception, its authority under Section 205 to prescribe rates is not limited, and it is that section under which the substantive requirements of the agency decision were ordered. Section 205 explicitly authorizes the prescription of charges, classifications, regulations and practices for all carriers. The incorporation of these substantive prescriptions into the vehicle of a tariff is a derivative matter, falling within the agency's general authority to conduct its business according to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). The Commission's authority to require connecting carriers to file access tariffs under Section 4(i), 47 U.S.C. § 154(i)—in spite of the language in Section 203—is well established. *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981). Moreover, in the decision below, the Commission left "connecting carriers," if any exist, with options other than the filing of tariffs of their own.[6]

Not only are petitioner's arguments without basis in law, they rest upon a factual premise not established below. Neither the agency, nor the court below, addressed the issue of what carriers, *if any*, are connecting carriers in view of the emerging competition in the telecommunications industry. *Compare Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939) (reviewing Commission's finding concerning connecting carrier status after

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[6] The FCC provided that, through a tariff pooling arrangement, carriers could file common tariffs. 93 FCC 2d 325-333. In this way, the rates of connecting carriers would not necessarily be reflected in tariffs of their own, but in tariffs filed together with carriers not classified as connecting carriers.

full hearing before the Commission). Moreover, the accuracy of petitioner's premise is certainly not apparent.[7] Until the agency determines what carriers, if any, may be properly classified as "connecting carriers" in the aftermath of the divestiture of AT&T, the issue raised by petitioners lacks a firm foundation in fact and thus is purely hypothetical and therefore should not be reviewed by the Court. *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974).

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[7] Local exchange telephone companies are now engaged in interstate communications through the offering of interstate access service. The vast array of interstate access services, which the local carriers offer, directly and significantly affect the quality and the type of interstate communication that can be transmitted and makes those carriers active and integral parts of the interstate network. Moreover, the physical connections in question are not solely connections with carriers, as required in Section 152(b) to qualify for classification as connecting carriers, but are also connections with private companies with their own private interstate facilities and networks not offered for public use. 737 F.2d at 1131.

Not only are heretofore local companies actively engaging in interstate communication through the offering of interstate access services, they are also actively operating interstate networks. GTE, which owns local telephone companies throughout the country, purchased the facilities of Southern Pacific Communications Corporation, and is the third largest interstate common carrier. *Application of GTE and SPCC and SPSC*, 94 FCC 2d 235 (1983). United Telephone Company, an owner of local exchange companies, has purchased U.S. Telephone, Inc. and now operates interstate circuits. *United Telecommunications, Inc. and U.S. Telephone, Inc.*, 56 Rad. Reg. 2d (P&F) 574 (1984). Any number of other local telephone companies have become interstate resellers by leasing the lines of other carriers. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 FCC 2d 554 (1983). The number of such companies cannot be determined because the FCC requires neither certificates of convenience and necessity nor tariffs for such resellers. *Id.* Even the BOCs own and operate some interstate circuits under the exceptions to the MFJ permitted by the U.S. District Court. *U.S. v. Western Electric Co.*, 569 F. Supp. 1057, 1100, 1107 (D.D.C. 1983).

CONCLUSION

For the reasons set forth above, and in MCI's August 17, 1984 Brief filed in No. 84-95, MCI respectfully requests that the petitions for certiorari in Nos. 84-816, 84-824, and 84-856 be denied.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES *
THOMAS R. GIBBON
THEODORE D. KRAMER

Its Attorneys

HALEY, BADER & POTTS
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-0606

* Counsel of Record

January 7, 1985

APPENDIX

STATUTORY PROVISIONS

The text of Section 2(b) and Sections 201-205 of the Communications Act, 47 U.S.C. §§ 152(b), 201-205, may be found in the appendix of the petition for certiorari in No. 84-856. The text of Section 3(u) of the Communications Act, 47 U.S.C. § 153(u) may be found in the appendix of the petition for certiorari in No. 84-816.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i) states:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(3) (3) (3)

Nos. 84-816, 84-824, 84-856

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

RAYMOND F. SCULLY *
ALAN B. STERNSTEIN
DILWORTH, PAXSON,
KALISH & KAUFFMAN
International Square
Suite 280
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 296-9620
Attorneys for Bell Operating Company Respondents

* Counsel of Record

January 7, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33

QUESTIONS PRESENTED *

1. This Court ruled in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), that, under the statutory antecedents to the Communications Act of 1934, local telephone exchange costs must be apportioned between those attributable to interstate service and those attributable to intrastate or local service. The Federal Communications Commission issued orders setting guidelines for the manner in which such costs, once allocated to interstate service, are to be recovered. To recover a portion of these costs, the guidelines would impose charges on end users who receive access to interstate service through the local exchange. Did the court below affirm the Commission's orders consistently with *Smith*?

2. Did the court below correctly decide that the Commission had jurisdiction to require local telephone companies to impose charges on their subscribers for re-

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* The following companies join in this Brief: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Telephone Company, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

Each of the foregoing Bell Operating Companies is a wholly owned subsidiary of a Bell Regional Holding Company, that is, American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group or Southwestern Bell Corporation. Each Regional Holding Company has outstanding securities in the hands of the public.

covering the costs the companies incur to provide their subscribers access to the interstate telephone network?

3. The court below determined that the Commission's decision to issue rules requiring access charges was not unlawful, arbitrary or unreasonable. Did the court below properly make that determination and affirm the Commission's decision on the basis of that standard?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. The Court Below Upheld the Commission's Access Charge Decision Consistently with *Smith v. Illinois Bell Telephone Co.*	10
II. The Court Below Correctly Ruled That the Commission Did Not Exceed Its Jurisdiction in Requiring an End User Access Charge	11
A. Sections 2(b)(1) and 221(b) of the Communications Act Do Not Deprive the Commission of Authority To Require End User Access Charges	11
B. The Imposition of Access Charges Through "Connecting Carriers" Is Within the Commission's Authority Under the Communications Act	16
C. The Commission's Actions Have Not Preempted any State Jurisdiction	18
III. The Court Below Correctly Determined That the Commission's Access Charge Decision Was a Reasonable and Adequately Based Exercise of Agency Authority	20
IV. Petitioners Seek a Redefinition of the Jurisdictional Division Between the Commission and the States That Is a Legislative Matter Not Suitable for Judicial Review	24
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) 23
American Commercial Lines, Inc. v. Louisville & Nashville R.R., 392 U.S. 571 (1968) 25
Associated Press v. FCC, 452 F.2d 1290 (D.C. Cir. 1969) 20
Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 23
Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) ..... *passim*
Dandridge v. Williams, 397 U.S. 471 (1970) 20, 22
FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 20, 21
FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 22, 25
FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 20, 21
FPC v. Conway Corp., 426 U.S. 271 (1976) 15
GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973) 18
Houston, E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914) 13
Lincoln Telephone & Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981) 17
MCI Telecommunications Corp. v. FCC, 675 F.2d 408 (D.C. Cir. 1982) 23
Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) 21
National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984) ..... *passim*
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 21
North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) ..... *passim*
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TABLE OF AUTHORITIES—Continued

Page

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Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930) ..... *passim*
Telecommunications Research and Action Center v. FCC, slip op. (D.C. Cir. No. 84-1035 October 24, 1984) 22
United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) 21
United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1981) 20
United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 14, 18

Administrative Decisions:

MTS and WATS Market Structure: Third Report and Order, 93 F.C.C.2d 241 (1983) 2, 6, 17, 19
MTS and WATS Market Structure: Memorandum Opinion and Order, 48 Fed. Reg. 42,984 (1983) .. 2, 22
MTS and WATS Market Structure: Memorandum Opinion and Order, 49 Fed. Reg. 7810 (1984) 2

Statutes and Regulations:

Communications Act of 1934:

Section 1, 47 U.S.C. § 151 14
Section 2(b), 47 U.S.C. § 152(b) ..... *passim*
Section 2(b)(1), 47 U.S.C. § 152(b)(1) ..... *passim*
Section 2(b)(2), 47 U.S.C. § 152(b)(2) ..... *passim*
Section 3(u), 47 U.S.C. § 153(u) 8
Section 4(i), 47 U.S.C. § 154(i) 17
Section 4(j), 47 U.S.C. § 154(j) 21
Section 201(b), 47 U.S.C. § 201(b) 8, 9, 14
Section 203, 47 U.S.C. § 203 17
Section 205, 47 U.S.C. § 205 ..... *passim*
Section 221(b), 47 U.S.C. § 221(b) ..... *passim*
Section 410(c), 47 U.S.C. § 410(c) 4

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

Communications Daily, Dec. 20, 1984 25
Hearings on H.R. 8301 Before the House Comm. on Interstate Commerce, 73d Cong., 2d Sess. 134 (1934) 13
Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 153 (1934) 13

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BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

The Bell Operating Companies, Respondents here, intervened below in the Court of Appeals for the District of Columbia Circuit in support of the Federal Communi-

cations Commission. Respondents submit this Brief in Opposition to the Petitions for Writs of Certiorari to review the Court of Appeals' decision filed by Petitioners the Florida Public Service Commission, the New York State Department of Public Service, the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission.

STATEMENT OF THE CASE

The Federal Communications Commission determined in a series of orders to establish guidelines for new charges to recover the costs incurred by local telephone exchange companies in providing access to the interstate telephone network.[1] Among the charges the Commission required was a monthly "access charge" to be imposed by telephone exchange companies on their subscribers to cover partially the cost of providing these end users access to interstate service. The Court of Appeals unanimously affirmed the Commission's decision to impose the end user access charge.[2]

Petitioners challenge the Court of Appeals' decision on three general grounds. They contend first that it is inconsistent with the jurisdictional division set forth in the statutory antecedents to the Communications Act of 1934, as this Court construed them in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).[3] Related to

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[1] The Commission's *Third Report and Order*, its initial access charge order, is reported at 93 F.C.C.2d 241 (1983). The Commission subsequently modified this order on reconsideration, 48 Fed. Reg. 42,984 (1983), and on further reconsideration, 49 Fed. Reg. 7810 (1984).

[2] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). In other respects, the Court of Appeals affirmed the Commission's orders in principal part, remanding for further consideration two limited aspects of the orders irrelevant to the issues here.

[3] Fla. Pet. at 9-10, 21; N.Y. Pet. at 13.

this jurisdictional claim are further claims that the court incorrectly ruled the Commission's actions were within the jurisdictional limitations set forth in Sections 2(b)(1) and 221(b) of the Communications Act, 47 U.S.C. §§ 152(b)(1), 221(b), which prohibit Commission regulation of intrastate matters,[4] and Section 2(b)(2), 47 U.S.C. § 152(b)(2), which Petitioners claim precludes Commission jurisdiction to require local exchange operating companies to impose access charges.[5] Finally, Petitioners contend that the court should have invalidated the Commission's decision as discriminatory and unreasonable.[6]

Petitions to review the decision below have already been filed by the National Association of Regulatory Utility Commissioners in No. 84-95 and the National Association of State Utility Consumer Advocates in No. 84-504. Respondents briefly set forth here a statement of the case necessary for addressing the questions the new state Petitioners present. A more detailed statement pertinent to this case is set forth in Respondents' Brief in Opposition to the NARUC Petition.

The interstate costs whose means of recovery is the subject of Petitioners' challenge include essentially the costs of installing and maintaining the so-called telephone subscriber "loop." The loop primarily consists of the line connecting a telephone subscriber to the central office. Through this line, the subscriber may make or receive local calls or long distance calls. The costs of providing and maintaining the loop are not traffic sensitive. That is, they do not depend on the volume or frequency of calls made over the loop.

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[4] Wis. Pet. at 18-20; Fla. Pet. at 11-12; N.Y. Pet. at 5-7, 14-16.

[5] Wis. Pet. at 11-18; N.Y. Pet. at 7-12.

[6] Fla. Pet. at 17-26.

Through the jurisdictional "separations" process established under Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), these non-traffic sensitive ("NTS") costs are allocated between the interstate jurisdiction of the Commission and the intrastate jurisdiction of the states. There is no dispute in this case that this allocation is required by this Court's decision in *Smith v. Illinois Bell Telephone Co.*; nor is there any dispute about the method the states and the Commission use to allocate these NTS costs. Rather, the dispute here is about how the Commission may go about imposing charges for recovering the NTS costs allocated to its jurisdiction.

For many years, these interstate NTS costs have been recovered through long-distance charges made on a usage basis depending on time and distance. Heavy interstate users, therefore, paid many times the interstate portion of their loop costs, while light users—whose loops cost just as much to maintain—paid only a small fraction of the same costs.

Petitioners contend that the charges necessary to recover interstate NTS costs may only be imposed when interstate calls are actually made. The Commission, however, determined to impose a charge on each subscriber to recover the NTS costs actually incurred to provide that subscriber access to the interstate telephone network. The fundamental purpose of the Commission's plan was to shift cost burdens to persons who caused them and to eliminate the unfairness of existing recovery methods for interstate NTS costs.[7]

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[7] Persons actually making interstate calls, however, would continue to be charged to recover traffic sensitive costs, that is, costs that are a function of the calls actually made. They would also pay some NTS costs passed on to them by interstate carriers, who are subject to a charge for their access to the local exchange that is not at issue here.

The Commission, in making its determination, sought to balance four objectives and arrive at a result that would be in the public interest. It sought to ensure universal telephone service, that is, service at costs affordable to all. It sought to eliminate discrimination through unjustifiable differences in charges. It sought an allocation of costs that would encourage economic efficiency in the interstate telephone network. Finally, it sought to avoid interstate charges so high as to encourage large volume users to avoid or "bypass" the local exchange, placing them beyond the reach of the exchange's interstate charges and thereby increasing the interstate charges for those subscribers remaining on the exchange.[8]

Taking these objectives into consideration, the Commission decided that a portion of the total NTS costs under its jurisdiction should be recovered by a flat-rate, rather than usage-based, access charge imposed on each telephone subscriber line. The end user access charge in effect reflects some, but not all, of the cost of each subscriber's loop that has been incurred to make interstate service available to that subscriber. Not only would this approach more equitably place costs on the cost causer, the Commission reasoned, but also it would allow interstate toll rates to be lower than they otherwise would have to be, thus reducing the risk of bypass of the local exchange.

The universal service objective, however, required the Commission to temper the implementation of its end user access charge approach and allow end users time to adjust to the effects of fully recovering NTS costs

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[8] Where short-haul communications links, such as microwave systems or private cables, can be obtained at costs less than those incurred under a usage-based rate structure, there is a strong, artificial incentive for high-volume users to bypass the local exchange and connect directly with an interstate carrier by building private communication links between their places of business and the interstate carrier's local "point-of-presence."

through access charges.[9] Thus, the Commission has imposed separate flat-rate access charges for residences (and single line business users) and multiline business users, and in nearly all areas, the two nationwide rates are well below the total interstate NTS costs allocated on a per line basis. Over a period of time, however, increasing amounts of interstate NTS costs may be recovered through gradually increasing the flat rates.[10]

The Commission also undertook to address universal service in two other ways. First, it committed to institute proceedings to define a category of subscribers needing access charge relief. Second, it created a Universal Service Fund. Through this mechanism, a portion of any area's NTS costs above the national average would be distributed for recovery nationwide as an element of access charges also to be imposed on interstate carriers.

The Court of Appeals decided that the Commission's determinations were not unreasonable and that nothing in the Communications Act precluded the imposition of a flat-rate access charge on local exchange subscribers to recover local exchange costs incurred to provide them interstate service. Responding to claims that the end user access charge did not recover interstate costs from the interstate network and effectively repealed the allo-

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[9] "We have . . . concluded that some adjustment in flat end user common line access charges must be made in order to balance the critical need to move towards a rational cost-based pricing system for access plant with the maintenance of universal service." *Third Report and Order*, 93 F.C.C.2d at 291. "[W]e have selected a low residential minimum in order to avoid an adverse effect upon universal service." *Id.* at 292.

[10] The balance of NTS costs not recovered from charges directly on end users will be recovered from the access charges on interstate carriers that are not at issue here. See discussion, *supra*, p. 4 n.7.

cation of costs between the interstate and intrastate jurisdictions, the court reasoned that such claims:

> "confuse or blend two questions: (1) jurisdiction or authority to recover costs; (2) the manner in which costs are to be recovered." 737 F.2d at 1112.

It then ruled that *Smith v. Illinois Bell Telephone Co.* addressed only the first question.

The court acknowledged the *Smith* admonition that "unless an apportionment [of exchange costs] is made, the intrastate service to which the exchange property is allocated will bear an undue burden." [11] The court ruled, however, that this language merely required that costs related to interstate service not be a part of the costs used in calculating the charges for local exchange service. *Id.* at 1112 n.18. It did not preclude recovering interstate costs from the persons for whom they were incurred.

The court also rejected arguments that the access charge was an exercise of jurisdiction over local charges contrary to the prohibitions of Section 2(b)(1) of the Communications Act. In response to claims that the charge was, in effect, a condition of local service, the court reasoned and decided:

> ". . . The end user charge reflects costs caused not by a subscriber's actually making interstate calls, but by the subscriber's connection into the interstate network . . . . [These l]ocal telephone plant costs are real; they are necessarily incurred for each subscriber by virtue of that subscriber's interconnection into the local network, and they must be recovered regardless of how many or how few interstate calls (or local calls for that matter) a subscriber makes . . . ." 737 F.2d at 1113-14.
>
> "The scheme advanced by the FCC simply requires all telephone subscribers to pay, on a per line basis, for that portion of *their necessarily-incurred local*

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[11] 282 U.S. at 151.

telephone plant costs assigned under *Smith* to the interstate jurisdiction." *Id.* at 1115 (emphasis in original).

Responding to claims that the access charge was an exercise of jurisdiction over "connecting carriers" contrary to the prohibitions of Section 2(b)(2),[12] the court noted Section 2(b) expressly makes connecting carriers subject to Sections 201 to 205 of the Act, 47 U.S.C. §§ 201-05. Section 2(b)(2), therefore, did not preclude Commission prescription of just and reasonable charges under Section 205 if the Commission found connecting carrier interstate rates unlawful, as it did, along with the interstate rates of all other exchange carriers.

Finally, the court held that Section 221(b) was irrelevant to claims that the access charge was in excess of the Commission's jurisdiction. That provision " 'was merely intended to preserve state regulation of local exchanges that happen to overlap state lines.' " 737 F.2d at 1113 n.21, quoting *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) (*"Computer II"*).

SUMMARY OF ARGUMENT

This Court's decision in *Smith v. Illinois Bell Telephone Co.* required only that the costs of operating the local exchange be apportioned between those attributable to interstate service and subject to federal jurisdiction and those attributable to intrastate or local service and subject to state jurisdiction. It did not prescribe how these costs, once apportioned, were to be recovered by the respective jurisdictions. Thus, in upholding the Commission's decision to require a charge to recover these costs from persons for whom they were incurred, the Court of Appeals ruled consistently with this Court's decision in *Smith.*

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[12] *See* 47 U.S.C. § 153(u) (defining the carrier described in Section 2(b)(2) as a "connecting carrier").

Similarly, the court correctly ruled that the Commission's access charge decision did not exceed the Commission's authority under the Act. An increasingly lengthy line of cases, none of which has prompted the need for review here, has rejected the view that Sections 2(b)(1) and 221(b) of the Act preclude Commission regulation of interstate matters that also affect matters of intrastate concern. *See Computer II, supra; North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*"NCUC II"*); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*"NCUC I"*). Because the Commission required the end user access charge to recover costs incurred in providing interstate service, the charge is plainly within the Commission's jurisdiction. Indeed, because the access charge decision neither displaces nor preempts any state regulation, its effect on matters of state concern barely begins to approach the preemptive effects that were nevertheless not a bar to Commission jurisdiction in *NCUC I* and *II* and *Computer II*.

Because Section 2(b) expressly subjects "connecting carriers" to the Commission's authority to prescribe rates under Sections 201 to 205, the court also correctly ruled that the Commission could require local exchange companies to impose access charges, whether or not, under Section 2(b)(2), such companies were connecting carriers not otherwise subject to Commission jurisdiction.

Finally, in response to claims that the Commission's access charge decision was arbitrary and discriminatory, the court carefully examined the Commission's rationale in reaching that decision. Having determined according to the applicable standard of judicial review that the Commission's decision was adequately supported and reasonable, the court properly upheld the Commission's decisionmaking.

In short, the Commission's actions confronted the Court of Appeals below merely with over worn questions of Commission jurisdiction. The court correctly decided these long settled questions and similarly undistinguished questions as to the soundness of the Commission's decision-making. Indeed, though couched as legal issues, the grievance the states press here is really with the allocation of jurisdiction between the Commission and the states that Congress established in 1934 when it enacted the Communications Act. Plainly, this is a legislative matter, and there is, therefore, no need for further review here.

ARGUMENT

I. The Court Below Upheld the Commission's Access Charge Decision Consistently with *Smith v. Illinois Bell Telephone Co.*

The claim that the Court of Appeals ruled inconsistently with this Court's decision in *Smith v. Illinois Bell Telephone Co.* is treated in depth in the Bell Operating Company Respondents Brief in Opposition in No. 84-95. Here, therefore, it is sufficient briefly to note that in *Smith* this Court merely held that that "[t]he separation of the intrastate and interstate property, revenue and expenses" was required for ratemaking purposes. 282 U.S. at 148. Apart from admonishing that "intrastate service" should not be burdened with the costs of interstate service, *id.* at 151, however, *Smith* did not prescribe how costs allocated to interstate service were to be recovered. In particular, it neither set forth guidelines or principles governing rate structures nor defined the persons subject to charges for interstate costs.

The Commission here has determined that, because the local exchange maintains facilities to provide each subscriber interstate service, each subscriber should pay a portion of the interstate NTS costs allocated to the Commission's jurisdiction in accordance with *Smith*. Although

this means that all local exchange subscribers will pay an end user access charge, whether or not they actually make interstate calls, it is nevertheless true that the access charge for interstate NTS costs is in every instance only imposed on persons for whom those costs are incurred and only imposed to recover costs attributable to interstate service. In short, the court below ruled consistently with *Smith* in upholding the Commission's access charge decision.

II. The Court Below Correctly Ruled That the Commission Did Not Exceed Its Jurisdiction in Requiring an End User Access Charge.

In addition to arguing that the Commission's actions were contrary to the jurisdictional principles set forth in *Smith* under the Communications Act's statutory antecedents, Petitioners argue that limitations set forth in Sections 2(b) and 221(b) of the Act have been transgressed.[13] Courts of appeals in several prior cases, however, have already rejected this view without having prompted further review here. The court below also correctly rejected the view, and its actions, therefore, are not worthy of review here either.

A. Sections 2(b)(1) and 221(b) of the Communications Act Do Not Deprive the Commission of Authority To Require End User Access Charges.

Section 2(b)(1) of the Communications Act denies the Commission jurisdiction to regulate "charges . . . for or in connection with intrastate communication service." The access charges challenged here, however, are interstate charges. Although Petitioners, through prodigious efforts at obfuscation, generally claim that the end user access charge is unlawful because it is in reality a local charge

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[13] Wis. Pet. at 19-20; Fla. Pet. at 11-12; N.Y. Pet. at 5-7.

that burdens intrastate service with interstate costs, their claims are simply misplaced.[14]

In particular, the access charge is determined solely on the basis of interstate costs, which no one disputes are the subject of Commission jurisdiction. Neither intrastate costs nor the amount of a subscriber's local calling enter into the calculation of the charge. Rather, it is imposed to recover the cost, and only the cost, of making interstate service available. The access charge, therefore, is neither a burden on intrastate service nor a charge for intrastate service.

Claims that the access charge is impermissible because it is not a function of actual use of the local exchange for long distance calling simply sidestep the issue.[15] The charge is still interstate in nature because it is imposed to recover costs that are unavoidably incurred for the purpose of making interstate access available to each local exchange subscriber, whether or not the subscriber actually makes long distance calls.

The access charge is also no more a local charge because it is a condition of local service than local charges are interstate because they are a condition of interstate service.[16] Because the same facilities are used in common to provide local and interstate service, acquisition of one use is unavoidably a condition of acquisition of the other.

To assume, as Petitioners clearly do,[17] that local exchange subscribers are persons subject only to the intrastate jurisdiction of the states and, therefore, are not persons subject to access charges begs the question as to

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[14] Wis. Pet. at 20, 23; Fla. Pet. at 7, 11, 14, 17.

[15] Wis. Pet. at 20.

[16] Wis. Pet. at 21.

[17] *See* Wis. Pet. at 20, 23; Fla. Pet. at 11, 14; N.Y. Pet. at 13, 15-16.

how the Commission's jurisdiction may be exercised to recover interstate NTS costs. To be sure, a local subscriber is subject to intrastate jurisdiction, but the subscriber is also necessarily an interstate subscriber, because, whether or not the subscriber makes interstate calls, the subscriber is afforded interstate access for which costs are incurred.

It is, therefore, a fiction to argue as Petitioners do that the ratepayers of the interstate jurisdiction are persons distinct from intrastate ratepayers. Because the interstate access and local access the local exchange provides are physically inseparable, each local exchange subscriber is also an interstate subscriber subject to interstate charges. The end user access charge, therefore, is not the exercise of jurisdiction over "charges . . . for or in connection with intrastate communication service" that Section 2(b)(1) prohibits.[18]

Were Section 2(b)(1) of the Communications Act construed to limit the Commission to recovering interstate costs from only interstate carriers and their customers, the Commission would be powerless to address matters directly affecting the economic viability of the interstate network and to avoid rate discrimination, even though

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[18] This conclusion is not changed even considering that the Communications Act sought to withhold from the Commission the type of jurisdiction supported by the "Shreveport Doctrine." *See Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914). The "Shreveport Doctrine" sanctioned the exercise of federal authority directly over intrastate rail rates because of the indirect effect that those rates had on interstate rail transportation. *See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 134, 136, 145 (1934); *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 153, 155, 156, 179 (1934). The imposition of access charges, however, is not such an exercise of authority. Not only is it the regulation of matters directly affecting interstate commerce, but, indeed, it is the regulation of interstate commerce itself, for the access charge is only an interstate charge.

addressing such matters is among the purposes for which the Commission was created and even though it has long been held that the Commission's powers are extensive enough to permit it to effect the purposes for which it was created.[19]

Among other things, the Commission was created "to make available, so far as possible, . . . a . . . wire . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. More specifically, Section 201(b) of the Act, 47 U.S.C. § 201(b), makes it clear that among the Commission's purposes is the issuance of "such rules and regulations as may be necessary" to ensure that "all charges, practices, classifications and regulations for and in connection with [interstate] communication service [are] just and reasonable." *See also* Section 205, 47 U.S.C. § 205 (authorizing Commission prescription of charges if existing charges are found to be unlawful).

The Commission has determined that the access charge is necessary to protect the economic viability of the interstate system and to permit costs related to interstate service to be recovered from all persons for whose benefit they are incurred, rather than placing a disproportionate share of those costs on some of the persons served by the interstate network. The Commission's access charge decision, therefore, is a perfect example of regulation aimed at ensuring adequate service at just and reasonable charges.

Moreover, the Commission's decision to require an access charge is as necessary to the regulation of the interstate network and as much a matter of interstate concern

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[19] " '[I]n the absence of compelling evidence that such was not Congress' intention . . . [courts should not] prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' " *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

—yet of far less intrastate impact—as its decisions in *NCUC II* and *Computer II*, where the courts have already rejected claims that Commission actions exceeded the limits of Section 2(b)(1).

The Commission's decision in *NCUC II* prohibited state restraints on interconnection of terminal equipment used for both interstate and intrastate communication, but much less for the former.[20] It was upheld notwithstanding claims that this action would significantly impact intrastate ratemaking by permitting increased substitution of private equipment for carrier-provided equipment, in turn reducing revenues and the corresponding amount of money available to subsidize other services and facilities. 552 F.2d at 1048. The Commission's decision in *Computer II* required intrastate detariffing of terminal equipment used for both interstate and intrastate communication. It was upheld despite this preemption of state ratemaking authority. 693 F.2d at 215-16. Just as the courts of appeals in *NCUC II* and *Computer II* correctly rejected claims under Section 2(b)(1) that the Commission had unlawfully intruded on state jurisdiction, without prompting further review here, so the court below correctly rejected the same claims in this case, and further review here is not warranted.[21]

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[20] *See NCUC II*, 552 F.2d at 1044 & n.7.

[21] This Court itself has rejected similar claims under the Federal Power Act. Also respondent to the "Shreveport Doctrine," see discussion, *supra*, p. 13 n.18, that Act prohibits Federal Power Commission regulation of retail (intrastate) electric rates. This Court has unanimously held, however, that the FPC is not precluded from adjusting wholesale (interstate) rates to respond to the problem of a discriminatory relationship between wholesale and retail rates. *See FPC v. Conway Corp.*, 426 U.S. 271 (1976). Notwithstanding the FPC's own contrary arguments, the jurisdictional limitation inspired by reaction to the "Shreveport Doctrine" meant only that the FPC could not set retail rates to remedy the problem. *Id.* at 277.

Section 221(b) is also not a jurisdictional bar to the access charge. The courts of appeals have consistently rejected arguments construing that provision to preclude Commission jurisdiction over exchange services generally. *See Computer II*, 693 F.2d at 216-17; *NCUC II*, 552 F.2d at 1045; *NCUC I* 537 F.2d at 795. Rather, the clear purpose of that provision is to prevent the Commission from exercising jurisdiction over a local exchange that the Commission would not otherwise be able to exercise but for the fact that the exchange straddles a state boundary. As in *NCUC I* and *II* and *Computer II*, where the states also sought review here, the court below correctly rejected the Section 221(b) claim, and further review is not warranted.

Petitioners' view that Sections 2(b)(1) and 221(b) preclude an end user access charge is an effort to parlay the limited purposes of those statutory exceptions into an emasculation of the regulatory powers specifically granted the Commission to achieve objectives clearly set forth in the Act.[22] The Court of Appeals correctly read the Act not to take with one hand the clear authority that it gives with the other—authority necessary to assure economic viability and just and reasonable charges for interstate communications.

B. The Imposition of Access Charges Through "Connecting Carriers" Is Within the Commission's Authority Under the Communications Act.

Petitioners also claim that the end user access charge exceeds the limitation of Section 2(b)(2) of the Act, which precludes the Commission from exercising jurisdic-

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[22] "Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms." *Rochester Tel. Corp. v. United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (construing Section 2(b)).

tion with respect to "any carrier engaged in interstate . . . communications solely through physical connection with the facilities of another [unaffiliated] carrier . . . ." They argue that because local exchange carriers, particularly after the divestiture required by the AT&T antitrust consent decree, cannot engage in interexchange activities, they are "connecting carriers" under Section 2(b)(2) whom the Commission may not require to impose access charges.

It is not necessary to decide, however, whether the Bell Operating Companies or other exchange carriers who always were independent of the AT&T system are connecting carriers, for the Court of Appeals correctly ruled that Sections 201 through 205 of the Act authorized the Commission to require connecting carriers to impose access charges. Under Section 2(b), Sections 201 to 205 of the Act expressly apply to the carriers that Section 2(b)(2) covers, except as otherwise provided in those sections. Section 205(a) specifically authorizes the Commission to prescribe just and reasonable charges for "any carrier or carriers" whose charges are found not to be just and reasonable or otherwise in violation of the Act. The Commission made just such findings as to the interstate rate structures existing prior to its access charge decision [23] and has now acted to establish guidelines for lawful rate structures.[24] Nothing in Section 205(a) exempts connecting carriers from this authority.[25]

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[23] *See Third Report and Order*, 93 F.C.C.2d at 256-58.

[24] *Cf. Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (holding Commission had authority to prescribe rates for and require tariff filings by connecting carrier under Section 4(i) of the Act, 47 U.S.C. § 154(i)).

[25] As the Court of Appeals ruled, 737 F.2d at 1115 n.23, although Section 203 exempts connecting carriers from the ministerial task of filing tariffs with the Commission, because the Section 203 filings of a non-connecting carrier show "all charges for itself and its con-

Thus, although the reach of Sections 201 through 205 is not limitless, only a very niggardly reading of those sections allows the view that end user access charges cannot be imposed pursuant to them.[26] Numerous Supreme Court and court of appeals decisions make it clear, however, that the provisions of the Communications Act, including Sections 201 to 205, are not to be construed so narrowly.[27]

C. The Commission's Actions Have Not Preempted any State Jurisdiction.

Petitioners struggle to pump significance into this case with the claim that because no incompatible state action is involved here, the Commission has improperly pre-

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necting carriers," it does not follow that a connecting carrier's tariffs are not subject to Commission review, let alone that connecting carriers are not not subject to Section 205(a).

[26] The Commission's ratemaking jurisdiction over connecting carriers under Sections 201 to 205 also lays to rest the view that connecting carriers, particularly after the AT&T consent decree, are no longer subject to the jurisdictional cost allocation required under *Smith v. Illinois Bell Telephone Co.* *See* Wis. Pet. at 13. Indeed, *Smith* itself is a refutation of that view, for it plainly holds that local plant is used, in part, to provide interstate service. Nothing in Section 2(b)(2) or the AT&T decree changes this jurisdictional fact.

[27] *See NCUC I*, 537 F.2d at 792, 793 (Section 2(b) does not "sanction[] any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under Sections 201 through 205"); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 736 (2d Cir. 1973) (upholding Commission action prohibiting connecting carriers from engaging in data processing business on basis of Sections 201 to 205, except through separate subsidiaries). *See also United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (declining to "construe the Act so restrictively" as to preclude Commission jurisdiction over cable television systems because such systems were located entirely within state boundaries).

empted state jurisdiction.[28] In so doing, Petitioners could not have erected a better strawman, for in point of fact there has been no preemption. The absence of incompatible state action reflects precisely this state of affairs. Indeed, given this absence of incompatible state regulation, one is left all the more to wonder just how it is that Petitioners believe the Commission has intruded upon jurisdiction reserved to the states.

There is plainly no basis for any claim that the Commission has preempted state jurisdiction. The states continue to have complete discretion to determine the charges for recovering costs allocated to intrastate service pursuant to *Smith* and to determine on whom those charges will be imposed. Petitioners, moreover, point to no state order or regulation that the Commission has preempted. Nor do the Commission's access charge orders anywhere declare that state authority is being preempted.[29]

At best, therefore, the "preemption" Petitioners claim is the imposition of access charges on "their ratepayers," meaning, presumably, local exchange subscribers.[30] As discussed above, however, this claim merely begs the question of which persons are responsible for interstate costs and on whom, therefore, charges for the recovery of such costs may be imposed. Ultimately, it fails to recognize that one person may be subject to multiple jurisdictions and, therefore, multiple charges.

In short, the jurisdictional claims that are at the core of Petitioners' challenge to the Commission's access charge decision do not merit review here, any more than did similar jurisdictional claims in *NCUC I* and *II* and *Com-*

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[28] N.Y. Pet. at 15-16.

[29] The Commission, in fact, has stated quite the contrary. *See Third Report and Order*, 93 F.C.C.2d at 260.

[30] N.Y. Pet. at 13.

puter II, where this Court also declined review. The Commission's decision does not raise any novel legal question about the correct construction of the Communications Act's division of federal and state authority. Instead, the decision is in keeping with an increasingly lengthy line of decisions construing the Act to authorize Commission regulation of interstate matters, notwithstanding the impact of that regulation on intrastate concerns. *See NCUC I* and *II* and *Computer II*.

III. The Decision Below Correctly Determined That the Commission's Access Charge Decision Was a Reasonable and Adequately Based Exercise of Agency Authority.

Petitioners contend that the Commission's access charge decision is arbitrary and, therefore, a violation of the Communications Act and "equal protection for the consuming public."[31] The Court of Appeals noted, however, that the problem the Commission addressed was very much predictive in nature.[32] "'[P]ure factual determinations,'" therefore, were not required to support the Commission's actions.[33] The court also noted "the leeway the FCC has to make 'deductions based on [its] expert knowledge.'"[34] Accordingly, after carefully examining the

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[31] Fla. Pet. at 22-26. Because Petitioners here challenge federal action regulating economic matters, their claim—whether tested under the Act or the Constitution—presumably is not and, in any case, could not legally be any more than the proposition that the Commission has acted arbitrarily or unreasonably in requiring an access charge for telephone subscribers. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77 (1981); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970); *Associated Press v. FCC*, 452 F.2d 1290, 1299-1302 (D.C. Cir. 1969) (separate rates for press tested under Act by arbitrary and unreasonable standard).

[32] 737 F.2d at 1117-18.

[33] *Id.* at 1117, quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

[34] 737 F.2d at 1117, quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

Commission's decision, the court ruled that the Commission's assessment of the bypass risk was adequately supported and that its decision to address the risk by requiring an end user access charge was not unreasonable.[35]

In reviewing the Commission's determinations, therefore, the court below plainly applied the proper legal standard for reviewing agency action. Petitioners do not challenge the standard applied.[36] Nor does anything Petitioners raise here suggest the standard failed in the court's application of it.

Petitioners first contend that the end user access charge is regressive and, therefore, does not ensure universal service. Whether or not the access charge is regressive, however, the issue of whether the Commission had appropriately treated relief for end users unable to pay any access charge was not before the Court of Appeals because the Commission had deferred the matter to future proceedings.[37] In any case, that the burden of a uniform

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[35] 737 F.2d at 1117.

[36] The applicable standard of review, of course, requires that the agency's action not be arbitrary or unreasonable, but in problems predictive in nature, neither definitive analysis nor pure factual determinations are required to support the action. *See FCC v. WNCN Listeners Guild*, 450 U.S. at 594; *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 814; *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). *See also United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972) ("we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported").

[37] 737 F.2d at 1117. Section 4(j) of the Communications Act, 47 U.S.C. § 154(j), gives the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . ." *See Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (upholding FCC decision to approve a rate of return for AT&T at the completion of the first phase of a two-phase investigation, even though a related issue as

charge falls unevenly on subscribers does not make it unreasonable or discriminatory.[38]

The access charge scheme is also not unreasonable or discriminatory because of its uniform nationwide nature. The uniformity results from the Commission's desire to permit a gradual adjustment instead of immediately requiring an access charge based on interstate NTS costs allocated entirely to end users. Thus, in all areas, the initial residential and single line business charge of two dollars is well below the charge that would result from an allocation of all interstate NTS costs to end user access charges.[39] The multi-line business charge of $6 is below the latter in nearly all areas and below the national interstate cost average of seven dollars per subscriber line.[40]

That the initial access charge will cause a greater percentage overall rate increase in some areas than in others merely reflects the pre-existing differences in costs for local telephone service around the country. In addition,

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to the earnings of AT&T's manufacturing subsidiary, Western Electric, remained to be determined in phase two of the investigation). A court may not direct the Commission to order its docket and consider cases with any particular priority. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *but cf. Telecommunications Research and Action Center v. FCC*, slip op. (D.C. Cir. No. 84-1035 October 24, 1984).

[38] *See Dandridge v. Williams*, 397 U.S. at 485-86 (welfare benefits granted without reference to family size not unlawfully discriminatory).

[39] The two dollar charge was established by the orders under review. The Commission, however, recently reduced this charge to one dollar. See discussion, *infra*, p. 25 n.45.

[40] The business line charge is actually less than $6 dollars in many areas because the Commission's access charge rules temporarily establish a ceiling on all charges that should be somewhere between four and six dollars. *See Reconsideration Order*, 48 Fed. Reg. at 42989 n.22. Indeed, in the tariffs that actually have been filed by Bell Operating Company Respondents, the charges nationwide range from $2.78 to the six dollar maximum.

access charge uniformity will continue because of the Commission's decision to help preserve universal service through nationwide averaging and by recovering any area's above average NTS costs through carrier access charges rather than end user charges.

Finally, Petitioners' claims that the access charge encourages bypass and will as a result leave investment in exchange plant stranded, increasing the cost of telephone service, is flatly contradicted by the Commission's determinations on this point after its own careful study and findings. Petitioners, therefore, would have the court below and ultimately this Court substitute their judgment for the Commission's. This is plainly beyond the scope of appellate review.[41]

In short, therefore, there is nothing unreasonable or discriminatory about the end user access charge. Rather, the charge is the product of Commission efforts to accommodate competing objectives, all of which are within the public interest that the Commission is charged with advancing.[42]

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[41] *See Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (even though the reviewing court's "inquiry into the facts is to be searching and careful," in assessing whether the agency's action is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' " "[t]he court is not empowered to substitute its judgment for that of the agency"); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) (in reviewing agency's selection of cost allocation principles for ratemaking purposes, court may only review reasonableness of decision but not substitute its judgment for agency's).

[42] *See MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 415-16 (D.C. Cir. 1982) (" 'political' " nature of cost allocation method selected by agency for ratemaking purposes was not invalid for that reason because "there is no purely economic method of allocation" where "elements of fairness and other noneconomic values inevitably enter the analysis of the choice to be made").

IV. Petitioners Seek a Redefinition of the Jurisdictional Division Between the Commission and the States That Is a Legislative Matter Not Suitable for Judicial Review.

The Court of Appeals has already reviewed the Commission's actions, correctly applying the applicable standards of review. Moreover, the questions of law presented to it concerning the Commission's jurisdiction have already been resolved in several prior court of appeals decisions without need for review here. Consistently with those decisions, the court below correctly ruled that the Commission did not exceed its jurisdiction in requiring end user access charges. There is, therefore, nothing new for review here.

Indeed, this controversy, at bottom, does not really involve legal questions concerning construction of the Communications Act. Instead, it reflects the states' disagreement with the manner in which Congress has divided jurisdiction to regulate telephone service. This dispute has its origin with the early requirement that local exchange costs be allocated between those attributable to providing interstate service and those attributable to providing intrastate service. *See Smith v. Illinois Bell Telephone Co., supra.* Then Congress, in enacting the Communications Act, continued to leave recovery of interstate costs under federal jurisdiction.

This division of responsibility sowed the seeds for inevitable tension between the state and federal jurisdictions. The recovery of exchange costs depends on imposing charges for various services at levels which will not so dampen telephone subscribership or usage as to result in a shortfall of the revenues required to cover costs. Consequently, state decisions to impose charges on certain persons for the recovery of intrastate costs practically constrain Commission decisions to impose additional

charges for the recovery of interstate costs on the same persons, and conversely.[43]

Petitioners' claims here that certain categories of persons are not subject to interstate charges, even though interstate costs are incurred for their benefit, are, therefore, ultimately an effort to revisit and resolve through judicial review the division of jurisdiction Congress legislatively confirmed with the Communications Act and the tensions inherent in that division.[44] Whether or not there should be some readjustment of jurisdiction to alleviate these difficulties, it is not an appropriate judicial undertaking but a legislative task involving competing matters of economic policy, national communications policy and state, federal and consumer interests.[45]

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[43] As one Petitioner notes (Fla. Pet. at 8): "The system seems straight-forward enough, and it would be if the [telephone] companies' activities were exclusively within the province of one jurisdiction."

[44] *See, e.g.*, Fla. Pet. at 26: "The states . . . believe that they are in a better position to set rate structures on a local basis carrying out the national policy of protecting universal service."

[45] *Cf. American Commercial Lines, Inc. v. Louisville & Nashville R.R.*, 392 U.S. 571, 586-89 n.16 (1968) ("This Court is not particularly suited to pass on the merits of the economic arguments made by the railroads' expert witnesses in these cases . . . . Our discussion here . . . is merely intended to illustrate the desirability of having the initial resolution of these issues made by a tribunal, and in a proceeding, more suitable than the present one"); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940) ("To a large degree [modern administrative tribunals] have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could [not] effectively be exercised directly . . . by the judicial process").

Indeed, the statutory devices for accommodating the competing interests are in place and functioning. Thus, as a result of the state and federal Joint Board procedures established in Section 410 of the Act, the Commission now has considered and adopted a Joint Board recommendation to reduce the residential and single line business access charge from two dollars to one. *See* Communications Daily, Dec. 20, 1984, at 1.

The Court of Appeals correctly determined that the Commission did not exceed its jurisdiction and that the Commission's access charge decision was adequately supported and reasonable. Insofar as this Court is concerned, that should be the end of the matter. No review here, therefore, is warranted.

CONCLUSION

For the reasons stated above, this Court should deny the petitions in Nos. 84-816, 84-824 and 84-856 and not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

RAYMOND F. SCULLY *
ALAN B. STERNSTEIN
DILWORTH, PAXSON,
KALISH & KAUFFMAN
International Square
Suite 280
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 296-9320
Attorneys for Bell Operating Company Respondents

* Counsel of Record

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Nos. 84-816, 84-824, 84-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, *et al.*,
Respondents.
(and two related petitions)

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

HOWARD J. TRIENENS
ALFRED A. GREEN
JUDITH A. MAYNES
JOSEPH J. STRELKOFF
295 North Maple Avenue
Basking Ridge, N.J. 07920

MICHAEL BOUDIN*
DAVID H. REMES
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 622-6000

Attorneys for American Telephone and Telegraph Company

*Counsel of Record

January 1985

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Use of Interstate End User Charges To Recover Interstate Costs Does Not Violate Section 2(b)(2) of the Communications Act	6
II. Florida's Attacks on the Merits of the Fixed End User Charges Do Not Merit Certiorari	9
III. The Pendency of Other Disputes Over FCC Authority Does Not Support Certiorari Here	11
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES	
Cincinnati Bell Telephone Co. v. *PUC*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984), *appeal pending*, No. 84-623	13
Lincoln Tel. & Tel. Co. v. *FCC*, 659 F.2d 1092 (D.C. Cir. 1981)	8
New England Tel. & Tel. Co. v. *Public Utilities Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for certiorari pending*, No. 84-900	13
Smith v. *Illinois Bell Telephone Company*, 282 U.S. 133 (1930)	4
South Central Bell Telephone Co. v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870	13

Page

Southwestern Bell Telephone Co. v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483 13

United States v. *AT&T*, 552 F. Supp. 131 (D.D.C.), *aff'd mem.*, 460 U.S. 1001 (1983) ... 13

Virginia State Corporation Comm'n v. *FCC*, 737 F.2d 388 (4th Cir. 1984), *appeal pending*, No. 84-871, *and petition for certiorari pending*, No. 84-889 12

STATUTES AND COURT RULES

Communications Act,

Section 2(b), 47 U.S.C. § 152(b) 6,7

Section 2(b)(1), 47 U.S.C. § 152(b)(1) 4,6

Section 2(b)(2), 47 U.S.C. § 152(b)(2) ..... *passim*

Section 3(u), 47 U.S.C. § 153(u) 6

Section 4(i), 47 U.S.C. § 154(i) 8

Sections 201-205, 47 U.S.C. § 201-205 6,7

Section 201(b), 47 U.S.C. § 201(b) 7

Section 202(a), 47 U.S.C. § 202(a) 7,9

Section 203(a), 47 U.S.C. § 203(a) 7,8

Section 205(a), 47 U.S.C. § 205(a) 7,8

Section 220, 47 U.S.C. § 220 12

Section 221(b), 47 U.S.C. § 221(b) 6

Section 401(b), 47 U.S.C. § 401(b) 12,13

Sup. Ct. R. 22.1 1

Sup. Ct. R. 19.4 2

Page

AGENCY PROCEEDINGS

In re MTS and WATS Market Structure, FCC Docket No. 78-72, adopted Dec. 19, 1984 3

Investigation of Access and Divestiture Related Tariffs, FCC Docket No. 83-1145 3

RULE 28.1 LISTING

American Telephone and Telegraph Company, which has no parent company, retains a minority interest in Cincinnati Bell Inc., which has outstanding securities in the hands of the public.[1]

[1] Counsel for AT&T understand Rule 28.1 to require disclosure of only those subsidiaries or affiliates with outstanding securities in the hands of the public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-816, 84-824, 84-856

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, *et al.*,
Respondents.
(and two related petitions)

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Pursuant to Rule 22.1 of the Rules of this Court, respondent American Telephone and Telegraph Company ("AT&T") opposes the petitions for certiorari filed by the Public Service Commission of Wisconsin, the State of Michigan, and the Michigan Public Service Commission (No. 84-816); the Florida Public Service Commission

(No. 84-824); and the New York State Department of Public Service (No. 84-856). The petitions seek review of the same judgment of the Court of Appeals. See Sup. Ct. R. 19.4.

STATEMENT OF THE CASE

In these three petitions for certiorari, four states join the National Association of Regulatory Utility Commissioners ("NARUC") and the National Association of State Utility Consumer Advocates ("NASUCA") in seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1] That judgment upheld, in all but minor respects, the FCC's access charge plan—a series of FCC orders establishing a new rate structure for interstate rates to recover the interstate costs of local telephone companies in originating and terminating interstate calls. See Pet. App. 27a-32a.[2]

The pertinent factual background, and the nature of the FCC's access charge plan, are set forth in AT&T's brief in opposition to NARUC's petition in No. 84-95; to avoid repetition, that statement is incorporated by reference here. However, it may be useful to the Court for this opposition to identify clearly the aspects of the access charge plan assailed by all five petitions; to relate the claims made in the various petitions to one another; and to apprise the Court of supplementary proceedings at the FCC following the access charge plan orders that the petitions seek to have reviewed on certiorari.

Under the FCC's access charge plan, local telephone companies are compensated for their interstate costs through a range of interstate charges. These include

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[1] NARUC's petition was filed in July 1984 (*NARUC* v. *FCC*, No. 84-95); NASUCA's petition was filed in September 1984 (*NASUCA* v. *FCC*, No. 84-504). AT&T has filed oppositions in both cases.

[2] "Pet. App." refers to Appendix A to NARUC's petition in No. 84-95.

charges to interexchange companies like AT&T, who require switching and other services from the local companies, and charges to end users who employ the same local company facilities to access both the exchange and interstate networks. In general, the access charge plan does not fix the individual charges but rather determines the structure of the interstate rates that the local companies are to file with the FCC. When filed, those charges are themselves subject to agency review.

Pursuant to the access charge plan orders, certain of the charges contemplated by the FCC have gone into effect [3] and are currently under review in pending Commission proceedings.[4] The structure for other charges, including the fixed end user charges for single-line businesses and for residential service, is still being developed in FCC proceedings that are not yet completed.[5] When those rate structure proceedings are completed, the additional charges will be reflected in tariffs that will themselves be subject to review by the FCC and ultimately review in the courts.

In the Court of Appeals, a wide array of attacks was made on the access charge plan by numerous petitioners or intervenors including carriers, end users, and states. All of the central criticisms were rejected in an extraordinarily

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[3] End user charges for multiline business customers, which may not exceed $6 per month, went into effect in May 1984, as did various charges paid by interexchange carriers.

[4] *Investigation of Access and Divestiture Related Tariffs*, FCC Docket No. 83-1145.

[5] Tariffs setting end user charges for residential customers and single-line businesses will not be filed until next year. A recently adopted FCC order establishes a general ceiling on per-line charges for residential users of $1 per month at the outset (rising to $2 in June 1986), subject to variations adapted to local circumstances and an exemption mechanism for customers who cannot afford such payments. *In re MTS and WATS Market Structure*, FCC Docket No. 78-72, adopted Dec. 19, 1984. This order not been reviewed by the Court of Appeals and is not the subject of any of the pending petitions.

thorough and detailed decision by the Court of Appeals. Pet. App. 1a-110a. In this Court, only five certiorari petitions have been filed, and all of them are addressed to only one aspect of the FCC's multifaceted access charge plan: the use of fixed interstate end user charges to recover a portion of the interstate costs of local telephone companies assigned to the interstate jurisdiction.

From the outset, the principal challenge by the states to the end user charges has been a claim that they are precluded by this Court's decision in *Smith* v. *Illinois Bell Telephone Company,* 282 U.S. 133 (1930), and by the "intrastate service" exemption of Section 2(b)(1) of the Communications Act, 47 U.S.C. § 152(b)(1). Those contentions were answered in AT&T's brief in opposition in No. 84-95; and, so far as the new petitions addressed in this opposition repeat those arguments, AT&T's brief in No. 84-95 is adopted by cross-reference.[6] The NASUCA certiorari petition in No. 84-504 raised a procedural claim—that oral hearings were required for the access charge plan—which AT&T answered in its opposition in No. 84-504 and which is not repeated by any of the new petitions.

The new certiorari petitions appear to raise three new sets of arguments. First, the Wisconsin-Michigan petition, supported in part by the New York petition, argues that the interstate access charges violate the "connecting carrier" exemption of Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2). Next, the Florida petition contends that the end user charge is unlawfully discriminatory and is in any event unwise as a matter of

[6] The *Smith* argument, principally relied upon by NARUC, is undercut by the Wisconsin-Michigan certiorari petition. That petition appears to argue that the lower court read *Smith* correctly but that *Smith* itself "ceased to have controlling authority under the Communications Act" as a result of the Bell System divestiture. Pet. 12-13. See pp. 13-14, below.

policy. Finally, the Wisconsin-Michigan petition, supported by the New York petition, asserts that the pendency of a number of other cases involving different disputes over FCC authority supports certiorari in this case.

SUMMARY OF ARGUMENT

The certiorari petitions filed by Wisconsin-Michigan and by New York make a new claim: that the FCC lacked jurisdiction to require fixed interstate end user charges to recover interstate costs. Both argue that such end user charges are prohibited by Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2), limiting FCC jurisdiction over so-called "connecting carriers." However, an explicit proviso in Section 2(b)(2) makes clear that, even as to connecting carriers, the FCC retains jurisdiction to require reasonable interstate rates. Accordingly, Section 2(b)(2) is no bar to the end user charges, whether or not individual local telephone companies are deemed to be connecting carriers.

Florida, unlike the other petitioners, challenges the merits of the end user charges, but its claims do not warrant certiorari. The FCC amply supported the determinations and findings that are challenged by Florida, and no claim of conflict between the circuits has been or could be made concerning the merits of the plan. Finally, the Wisconsin-Michigan and New York petitions assert that a number of *other* pending or prospective cases in this Court involve questions of FCC authority; but the prospect or possibility of review by this Court of other issues of FCC authority, not presented by the access charge plan or the decision below affirming it, provides no reason for review in this case.

ARGUMENT

I. The Use of Interstate End User Charges To Recover Interstate Costs Does Not Violate Section 2(b)(2) of the Communications Act.

In several respects, the new petitions challenge the FCC's authority to set fixed end user charges by repeating arguments made in the NARUC certiorari petition and already answered in AT&T's brief in opposition.[7] However, two of the petitions—Wisconsin-Michigan (Pet. 12-13) and New York (Pet. 7-8)—do offer one new jurisdictional argument. They claim that Section 2(b)(2) of the Communications Act, limiting FCC authority over "connecting carriers,"[8] forbids the FCC from requiring such carriers to set interstate end user charges; and in particular these states argue that this limitation curtails the FCC's power to mandate such charges for the former Bell System Operating Companies ("BOCs") which the states contend are now "connecting carriers" as a result of their divestiture from AT&T.

As the Court of Appeals observed (Pet. App. 43a-44a, n.23), the answer to this argument is provided by the explicit language of Section 2(b)'s final proviso.

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[7] These claims include NARUC's argument that the charges violate Section 2(b)(1) of the Act because they are allegedly charges for "local" service (answered at AT&T's brief in opposition in No. 84-95 at pp. 8-11), and NARUC's argument that such charges violate Section 221(b) of the Act, 47 U.S.C. § 221(b) (answered at AT&T's brief at p. 8 n.8).

[8] Section 2(b)(2) provides, with qualifications not here relevant, that the Act does not apply to or give the FCC jurisdiction over a carrier "engaged in interstate . . . communications solely through physical connection with the facilities of another carrier," "except that sections 201 to 205 of [the Act] shall, except as otherwise provided therein, apply to [such] . . . carriers." Elsewhere the Act classifies such Section 2(b)(2) carriers as "connecting carriers." Section 3(u), 47 U.S.C. § 153(u).

Although Section 2(b)(2) does in certain respects restrict FCC authority over connecting carriers, Section 2(b) concludes by providing "that sections 201 to 205 of [the Act] shall, except as otherwise provided therein, apply to [such connecting] . . . carriers." See p. 6, n.8, above. In other words, connecting carriers are not automatically subject to a variety of ancillary provisions of the Act, but they continue to be subject to most of the core requirements of Sections 201-05, 47 U.S.C. §§ 201-05, *including* the power of the FCC to order them to charge reasonable rates under Section 205(a) of the Act, 47 U.S.C. § 205(a).[9]

The FCC's determination of the interstate rate structure, including fixed interstate end user charges, is an exercise of the FCC's authority under Section 205(a) of the Act. Pet. App. 43a-44a, n.23. Whether or not an individual telephone company is classified as a connecting carrier is irrelevant because, under Section 2(b)'s proviso, the FCC retains power over such carriers to require them to establish reasonable interstate rates. There is no conflict on this issue with the decision of any other court.

The petitions argue that connecting carriers are exempt from the requirement of Section 203(a), 47 U.S.C. § 203(a), that charges for interstate service be reflected in tariffs filed with the FCC. This provision shifts the mechanical obligation to file tariffs covering a connecting carrier by requiring that the interstate carrier with which the connecting carrier connects shall file tariffs reflecting charges for itself "and its connecting carriers" for interstate service. Section 203(a). It does not qualify the FCC's power under Section 205(a) to require *all* carriers,

[9] Section 205(a) implements the requirements of Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a), that interstate rates be just, reasonable, and not unreasonably discriminatory. None of these provisions contains any internal exemption excluding connecting carriers from their requirements.

including connecting carriers, to maintain interstate rates that are reasonable and not unreasonably discriminatory. Thus, even if Section 203(a) precluded the FCC from requiring tariff filings by connecting carriers—which it does not—those carriers would still have to employ the fixed end user charges that the FCC has found to be appropriate under Section 205(a).[10]

Furthermore, the District of Columbia Circuit ruled in an earlier case that the FCC does have discretionary authority to require connecting carriers to file tariffs for interstate services. Even though Section 203(a) does not automatically command such filings by connecting carriers, the FCC has been held to have general authority to require such carriers to file tariffs for interstate services.[11] No conflict exists with respect to the power of the FCC, on a discretionary basis, to require the filing of tariffs by all local telephone companies where interstate services are involved.

In sum, the FCC clearly has authority under the Act to establish interstate end user charges to be collected by local telephone companies even if it is assumed that some individual companies are connecting carriers under Section 2(b)(2). The "connecting carrier" exemption relied on by the new petitions, like the "intrastate service" exemption relied on by NARUC, is irrelevant to this case. The FCC's exercise of its authority over interstate rates is consistent with the language of the Act and all existing case law, and the issue of FCC authority is plainly not one on which certiorari is warranted.

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[10] Because all carriers are subject to Section 205(a), the FCC had no occasion to determine in this case the "connecting carrier" status of any local telephone company, nor did the lower court address that subject.

[11] *Lincoln Tel. & Tel. Co.* v. *FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (construing Section 4(i) of the Communications Act, 47 U.S.C. § 154(i)). Section 203(a) does not forbid the FCC to require the filing of tariffs by connecting carriers; it merely exempts them from an automatic statutory filing requirement.

II. Florida's Attacks on the Merits of the Fixed End User Charges Do Not Merit Certiorari.

In its petition, Florida makes two attacks on the merits of the fixed interstate end user charges. Although it now argues that the end user charges are discriminatory, Florida did not make this argument in the lower court and the Court of Appeals did not pass upon it. Florida did argue below that the use of flat end user charges threatened universal service and the lower court correctly rejected that argument. Neither contention presents any conflict in the circuits or otherwise warrants certiorari.

Florida's first claim is that the use of a uniform end user access charge is "discriminatory" because the actual interstate non-traffic sensitive costs, covered in part by such charges, vary from place to place. From this premise, Florida argues that the fixed end user charges therefore bear "no relationship to actual cost" (Pet. 17) and concludes that the charges therefore constitute forbidden discrimination in rates under Section 202(a). *Id.* Florida is incorrect as to both its description of the end user charge and the law governing discrimination under the Communications Act.

As the Court of Appeals made clear, there is no statutory requirement that every charge reflect the precise cost of the individual user. *E.g.*, Pet. App. 59a, 83a, 92a. On the contrary, "averaged" charges have been utilized for years in telephone rate making even though the precise cost of providing a service to an individual customer may vary for virtually every customer. Merely as an example, many jurisdictions have used flat monthly exchange charges for local residential service; but the cost of serving each individual customer varies significantly depending on distance of the house from the central office, the number of local calls made each month, and several other factors. Under Florida's theory, all such flat local charges would constitute unreasonable discrimination.

In any event, Florida is wrong in suggesting that the end user charges are required to be uniform under the FCC's access charge plan: The agency is establishing *caps* for different classes of end user charges. Within the framework of the rate structure established by the FCC, the end user charges filed by different companies can and do vary from area to area. Indeed, the end user charges in different jurisdictions for multiline businesses range from under $3 up to the $6 ceiling. Similarly, the recently adopted proposals for residential charges would permit local variations. See p. 3, n.5, above. The lawfulness of individual charges is not at issue in this case,[12] but these facts refute Florida's repeated intimation that end user charges have been designed as a regulatory straitjacket permitting no latitude or variation.

Apart from its claim of discrimination, Florida argues that fixed end user charges undermine the goals that the FCC sought to achieve. Pet. 22-26. Florida asserts that the charges, because they are fixed, are "regressive" and will necessarily undermine the FCC's goal of universal service (*id.* at 22-23); that the charges, by driving poor customers off the network, will drive up the cost that must be borne by heavy users, thus encouraging them to bypass the network and utilize less expensive alternatives (*id.* at 23-24); and that the result will be to "idle[ ] the system and encourage inefficiency." *Id.* at 24-25. These claims are unfounded.

The notion that fixed end user charges will encourage bypass has the matter backwards. The FCC demonstrated, in findings affirmed by the Court of Appeals, that the end user charges ultimately reduce the costs currently

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[12] As noted, individual charges within the framework of the access charge plan are embodied in tariff filings which are open to challenge in conventional tariff proceedings under the Act. See, *e.g.*, p. 3 & n.5, above.

borne by heavy users who did not cause those costs; and this reduction in the costs that must be recovered through interstate per minute rates paid by heavy users will reduce their incentive to bypass the network. Pet. App. 44a-50a. These findings are amply supported by the evidence (*id.*), but even if they were debatable, this Court does not normally grant certiorari to review agency fact findings which do not, and indeed could not, present any conflict of law between the circuits.

Florida may be arguing in the alternative that fixed end user charges, alleged to be "regressive," would bear heavily upon poor residential customers. The FCC has met this contention. Although it has found presumptively that cost causers should bear their own costs, the FCC has deferred end user charges for *all* residential customers until it has completed its current proceedings to devise exemptions for customers who could not afford even the minimal contribution now contemplated for residential customers. Florida cannot now complain in this Court about the design of such exemptions because that subject is still before the FCC in proceedings now being completed. See p. 3, n.5, above.

III. The Pendency of Other Disputes Over FCC Authority Does Not Support Certiorari Here.

The Wisconsin-Michigan and New York petitions cite a series of cases involving disputes over FCC authority, and they urge that the pendency of those cases warrants certiorari here. None of these cases presents the issues that are involved in this case and, whatever the basis for review in the cited cases, they cannot support certiorari here.

First, the recent decision of the Fourth Circuit, to which both the Wisconsin-Michigan and the New York petitions refer, has nothing whatever to do with access

charges.[13] The Fourth Circuit there affirmed a decision of the FCC involving depreciation of telephone plant. Specifically, the FCC ruled that, after it established methods of computing depreciation for telephone plant used interchangeably for interstate and intrastate service, the states could not ignore the FCC's determinations and require that the same property be depreciated on a different basis in state ratemaking proceedings.

The FCC's authority to determine depreciation rates and methods is conferred by Section 220 of the Communications Act, 47 U.S.C. § 220, which specifically empowers the FCC to establish binding depreciation rates and methods. The access charge decision does not depend on Section 220 or involve any conflict between federal and state methods of computing depreciation. The FCC here was concerned solely with structuring interstate rates to recover interstate costs in a manner consistent with federal policy goals. Nothing in the efforts of state parties to obtain review of the Fourth Circuit decision provides a basis for or supports certiorari in this case.

Second, the Wisconsin-Michigan petition refers to another controversy, now the subject of certiorari petitions or appeals in this Court, involving yet another, quite distinct issue. Pet. 8. That issue is whether FCC orders issued in rulemaking proceedings are enforceable in District Courts under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), or whether such District Court enforcement actions are restricted to adjudicatory orders. There is in fact a conflict on this issue of District Court

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[13] *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), *appeal pending*, No. 84-871, *and petition for certiorari pending*, No. 84-889.

enforcement authority between the First and Fifth Circuits,[14] and it may be this Court will conclude that this conflict justifies review.

However, the possibility of a grant of review of the First or Fifth Circuit decision on the Section 401(b) issue does not provide any basis for an argument that this Court should review the access charge decision by the District of Columbia Circuit. The conflict between the First and Fifth Circuits relates solely to the enforcement regime to be used in implementing valid FCC orders. That issue turns on the construction of Section 401(b) of the Act and the policies relevant to enforcement of agency orders. No enforcement question is presented in the present access charge case.[15]

Finally, Wisconsin-Michigan urge that certiorari should be granted to gauge the "impact" of the divestiture decree in the AT&T antitrust case[16] on the "correct apportionment of regulatory jurisdiction between federal and state authorities." Pet. 5, 12-13. See also New York Pet. 4. However, the petitions offer only one clearly articulated argument to connect the divestiture decree with the access charge decision, namely, the claim that the divestiture decree has converted the BOCs into connecting carriers under Section 2(b)(2) of the Act. Even if this

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[14] Compare *New England Tel. & Tel. Co.* v. *Public Utilities Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for certiorari pending*, No. 84-900, with *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870.

[15] Two other cases involving enforcement are cited by the Wisconsin-Michigan petition: *Cincinnati Bell Telephone Co.* v. *PUC*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984), *appeal pending*, No. 84-623, and *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483. Neither case involves access charges.

[16] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C.), *aff'd mem.*, 460 U.S. 1001 (1983).

were true, and neither the FCC nor any court has so ruled, it would be irrelevant to the validity of the access charge plan; as shown at pp. 6-7, above, the FCC clearly has power to require all local telephone companies, including connecting carriers, to use reasonable and non-discriminatory interstate charges to recover interstate costs.

If the states are arguing that the divestiture decree provides a basis for reexamining generally the FCC's authority over the BOCs, the argument misconceives the proper timing and occasion for such review. After an antitrust decree has been approved and affirmed by the courts, its construction thereafter is properly litigated in concrete contexts where resolution has a demonstrated effect on the outcome of an individual controversy. In this case, none of the challenges made by the states to the access charge plan requires the construction of the anti-trust decree; there was no construction of that decree by the court below; and no issue of construction is properly presented on certiorari in this case.

The petitioners' resort to unrelated cases involving FCC authority, as an asserted basis for review of the access charge plan, is a confession of the weakness of their petitions in this case. This Court does not grant certiorari because the agency is engaged in numerous cases; it requires a showing that, in the particular case for which certiorari is sought, there is a conflict among the circuits or some other recognized basis for Supreme Court review. No accepted basis for certiorari has been established in *this* case either by the original NARUC and NASUCA petitions or by the three additional petitions that are addressed in this opposition.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

HOWARD J. TRIENENS
ALFRED A. GREEN
JUDITH A. MAYNES
JOSEPH J. STRELKOFF
295 North Maple Avenue
Basking Ridge, N.J. 07920

MICHAEL BOUDIN*
DAVID H. REMES
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
**Counsel of Record*

Attorneys for American Telephone and Telegraph Company

Office-Supreme Court, U.S.
FILED
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CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

FLORIDA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

JACK D. SMITH
General Counsel
DANIEL M. ARMSTRONG
Associate General Counsel
JOHN E. INGLE
Deputy Associate General Counsel
STEVE KAMINER
Assistant General Counsel
Federal Communications Commission
Washington, D.C. 20554

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

This case raises questions as to the validity of certain aspects of the FCC's end-user access charge plan, which provides for the recovery of a part of the cost of local telephone company equipment. A large portion of that equipment is used for both intrastate and interstate service; part of the cost of that equipment is "non-traffic-sensitive"—*i.e.*, it does not vary with the extent of use. The Commission has adopted a plan pursuant to which most of the portion of these non-traffic-sensitive costs that is allocated to the "interstate jurisdiction" ultimately will be recovered through a flat access fee payable by all telephone subscribers, without regard to whether they make interstate calls.

The questions presented are:

(1) Whether the Commission invaded the authority to set rates for intrastate service that is reserved to the states by the Communications Act.

(2) Whether the Commission's end-user access charge plan prescribes rates which are unlawfully discriminatory.

(3) Whether the Commission's end-user access charge plan will have an adverse effect on universal service that is impermissible under the Communications Act.*

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*All of the petitions to which we respond herein raise some aspect of Question 1, which also was presented by the petition in No. 84-95, *National Association of Regulatory Utility Commissioners* v. *FCC*. No. 84-95 also seeks review of the judgment of the court of appeals challenged here. In this brief we address only those aspects of Question 1 not addressed in our brief in opposition in No. 84-95. Petitioner Florida alone raises Questions 2 and 3.

TABLE OF CONTENTS

	Page
Opinions below	3
Jurisdiction	2
Statement	2
Argument	3
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Domestic Communications-Satellite Facilities, 35 F.C.C.2d 844, on reconsideration, 38 F.C.C.2d 665	7
Integration of Rates & Services, 87 F.C.C.2d 20	7
Lincoln Telephone & Telegraph Co. v. *FCC*, 659 F.2d 1092	6
New England Telephone & Telegraph Co. v. *Public Utilities Comm'n*, 742 F.2d 1, petition for cert. pending, No. 84-900	12
Smith v. *Illinois Bell Telephone Co., 282 U.S. 133*	4
South Central Bell Telephone Co. v. *Louisiana Public Service Comm'n*, 744 F.2d 1107, appeal pending, No. 84-870	12
United States v. *AT & T*, 552 F. Supp. 131, aff'd, 460 U.S. 1001	12
Virginia State Corp. Comm'n v. *FCC*, 737 F.2d 388, appeal and petition for cert. pending, Nos. 84-871, 84-889	12

Statutes and regulations:

Communications Act, 47 U.S.C. 151 *et seq.*	4
§ 1, 47 U.S.C. 151	9
§ 2(b), 47 U.S.C. 152(b)	4, 5

Statutes and regulations—Continued: Page

§ 2(b)(2), 47 U.S.C. 152(b)(2) 5
§ 4(i), 47 U.S.C. 154(i) 6
§ 201, 47 U.S.C. 201 ..... 5, 6, 8
§ 201(b), 47 U.S.C. 201(b) 5
§ 202, 47 U.S.C. 202 ..... 5, 6, 8,
§ 202(a), 47 U.S.C. 202(a) 5
§ 203(a), 47 U.S.C. 203(a) 5
§ 205, 47 U.S.C. 205 ..... 5, 8
§ 205(a), 47 U.S.C. 205(a) 5
§ 206-209, 47 U.S.C. 206-209 8

28 U.S.C. 2341-2349 9

47 U.S.C. 402(a) 9

47 U.S.C. 410 8

Miscellaneous:

FCC News Report No. 18196 (Dec. 20, 1984) 8

Further Notice of Proposed Rulemaking, 49 Fed. Reg. 18318 (1984) 8

Recommended Decisions and Order, 49 Fed. Reg. 48325 (1984) 8

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (84-95 Pet. App. 1a-110a[1]) is reported at 737 F.2d 1095. The orders of the FCC are reported at 93 F.C.C.2d 241 (Report and Order), 48 Fed. Reg. 42984 (1983) (Order on Reconsideration), and 49 Fed. Reg. 7810 (1984) (Order on Further Reconsideration).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. A petition for rehearing was denied on August 23, 1984. The petitions for a writ of certiorari were filed on November 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case, like *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 84-95, and *National Association of State Utility Consumer Advocates* v. *FCC*, No. 84-504, arises from rulemaking proceedings undertaken by the Federal Communications Commission (FCC) to determine, inter alia, how local telephone companies should recover the "interstate" portion of the fixed costs of those local exchange facilities that may be used for both interstate and intrastate telephone service.[2] In the series of orders generally known collectively as the "*Access Decision*," the

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[1] Hereinafter "Pet. App." denotes the appendix to the petition for a writ of certiorari in the related case, No. 84-95. See page I note *, *supra*.

[2] The pertinent technical and regulatory background is described in the government's brief in opposition in No. 84-95. The procedures employed by the Commission in arriving at its *Access Decision* are described in our brief in opposition in No. 84-504 (at 2-3).

Commission endorsed a new system under which most of the interstate share of the costs of non-traffic-sensitive, jointly-used local exchange facilities ultimately will be recovered directly from telephone subscribers through fixed monthly charges.[3]

Numerous petitions for review of the Commission's *Access Decision*, raising a wide variety of claims, were filed in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals affirmed the agency's action in all but minor respects. Five petitions for certiorari have by now been filed in this Court. Those petitions challenge only that portion of the *Access Decision* which required the use of fixed end-user charges to recover the portion of the non-traffic-sensitive costs of local exchange equipment assigned, through the separations process, to the interstate jurisdiction.

ARGUMENT

1. Each of the most recent round of petitions urges that the access charge devised by the Commission to enable local exchange carriers to recover the interstate share of the non-traffic-sensitive costs of local exchange equipment used for both local and long-distance calls invades authority reserved to the states under the Com-

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[3] As we have explained in our response in No. 84-504 (at 2, 6-7), in the *Access Decision* the Commission did not actually approve tariffs or fix rates. Rather, it devised a framework for the recovery of the interstate share of the fixed cost of local exchange facilities. Pursuant to the *Access Decision*, local telephone companies will eventually be required to file tariffs specifying the rates they will charge for access to interstate service. At present, only tariffs setting rates for multi-line business customers need be filed; but beginning in June 1985, the FCC will require the filing of tariffs specifying end-user charges for other customers. Developments in this area subsequent to the conclusion of the proceedings below in this case are described at page 8 note 11, *infra*.

munications Act or by this Court's decision in *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).[4] Similar contentions were advanced in Nos. 84-95 and 84-504; these are addressed in our response in No. 84-95 (at 6-11). This response is confined to matters not addressed in our previous response. The issue framed by petitioners in No. 84-816 [hereinafter "Wisconsin"] and petitioner in No. 84-856 [hereinafter "New York"] is a permutation of the issue previously addressed. These petitioners contend that, in the aftermath of the divestiture decree separating the former Bell Operating Companies from the American Telephone and Telegraph Company, the operating companies have assumed the status of "connecting carriers" for purposes of the Communications Act, 47 U.S.C. 151 *et seq*. Under Section 2(b) of the Communications Act, 47 U.S.C. 152(b), the authority of the FCC is in some respects more limited with respect to connecting carriers than with respect to interstate carriers. Because the access charge system entails payment directly to local exchange companies of each subscriber's assessment for the interstate share of fixed local exchange costs, these petitioners contend that implementation of the access charge regime is beyond the Commission's authority.

This argument was correctly rejected by the court of appeals (Pet. App. 43a-44a n.23). Even if we assume arguendo that the former Bell Operating companies are now to be regarded as "connecting carriers" for purposes of the Communications Act,[5] it does not follow

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[4] See 84-816 Pet. 11-22; 84-824 Pet. 7-17; 84-856 Pet. 5-14.

[5] The FCC was not asked in the access charge proceeding to determine whether the divested Bell operating companies are connecting carriers within the meaning of the Communications Act. That question thus is not properly before this Court, and should not be considered in the first instance in a reviewing court. The question of the federal regulatory status of those divested companies is an important one that the FCC should con-

that the Commission was without authority to institute the access charge regime. To be sure, Section 2(b)(2) of the Communications Act on its face withholds from the Commission certain powers over connecting carriers that are not owned or controlled by interstate carriers. But the proviso to Section 2(b) makes clear that "sections 201 to 205 of [title 47] shall, except as otherwise provided therein, apply to carriers described" therein, including connecting carriers. Thus, the very statute on which these petitioners rely explicitly makes connecting carriers subject to the FCC's authority under Sections 201 through 205, 47 U.S.C. 201-205. Sections 201 through 205, the FCC's principal ratemaking statutes, provide ample authority for the Commission's imposition of end-user access charges to be paid to connecting carriers. As the court of appeals observed (Pet. App. 43a-44a n.23), while Section 203(a) of the Communications Act, 47 U.S.C. 203(a), does not *require* connecting carriers to file tariffs with the Commission,[6] under Sections 201, 202 and 205 their rates still must be just and reasonable.[7] "[N]othing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205" (Pet. App.

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sider in the first instance. Its resolution turns in large part on factual determinations as to just what activities the divested Bell companies may engage in. The record in the access charge proceeding is not adequate to resolve the connecting carrier status question that California and New York seek to raise here.

[6] Section 203(a) requires carriers, "except connecting carriers," to file tariffs with the FCC. Connecting carriers traditionally have concurred in the tariffs filed by AT&T for interstate service, although they also have filed tariffs and tariff exceptions of their own where appropriate.

[7] Sections 201(b) and 202(a) require that rates be just and reasonable and not unreasonably discriminatory. Section 205(a) allows the Commission to enforce the provisions of Sections 201 and 202 and to prescribe lawful rates in the event the tariffs filed are unlawful.

43a-44a n.23). Moreover, in order to ensure that the rates charged by connecting carriers are not in violation of Sections 201 and 202 of the Act, 47 U.S.C. 201 and 202, the FCC has *discretion* to use its powers under Section 4(i), 47 U.S.C. 154(i), to require connecting carriers to file tariffs. See *Lincoln Telephone & Telegraph Co.* v. *FCC*, 659 F.2d 1092, 1108-1109 (D.C. Cir. 1981).[8] In sum, the Commission has the authority to impose flat access charges on end-users and to require carriers to implement those charges by filing tariffs with the federal agency. This is true regardless of whether the former Bell operating companies are deemed connecting carriers.[9]

2. Observing that nationally uniform access charges will impose a larger percentage incremental cost increase upon telephone subscribers in areas where local exchange service is comparatively inexpensive, petitioner Florida contends (84-824 Pet. 17-21) that the *Access Decision* fosters unlawful discrimination in rates in violation of 47 U.S.C. 202. The factual premise advanced by the state does not establish the legal conclusion tendered.

As Florida observes (84-824 Pet. 8-9), in determining local rates, state regulatory utility commissioners take

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[8] Section 4(i), 47 U.S.C. 154(i), provides, in relevant part, that the FCC may "issue such orders, not inconsistent with [the Act] as may be necessary in the execution of its functions."

[9] While the divested Bell operating companies collectively serve a majority of the nation's telephone subscribers, it is useful to bear in mind that the FCC's access decision also applies to some 1500 independent local companies that were not affiliated with AT&T at the time the decision was made. Thus, even if the divestiture had not occurred, the FCC's order would have been applicable to many companies that claimed to be connecting carriers. The court of appeals addressed the general question of the FCC's authority over connecting carriers, without special focus on the divested Bell companies, and found that authority to be adequate (Pet. App. 43a-44a n.23).

into account many factors, including the amount of the investment in equipment, operation and maintenance costs, and expected rate of return for investors. State regulators are also free to, and do, follow diverse policy orientations in ratemaking; the inevitable result is that local rate structures are not uniform among jurisdictions. Given this latitude for variation, it is also inevitable that a uniform flat access charge will not always constitute the same proportion of local exchange rates. But the mere existence of variation in these proportions from area to area does not establish that uniform access charges are discriminatory or that they are not cost based. Rather, the question whether access charges should be adjusted to reflect local costs is a policy decision committed to the Commission.

Averaging of charges on a nationwide basis is consistent with past practice in the telephone industry. For many years, long-distance charges have been averaged on a nationwide basis.[10] Similarly, most local telephone companies charge a flat fee for telephone service regardless of the distance between customer premises and the telephone company's central office, thereby effecting an averaging of rates. Under the argument advanced by Florida, such practices would be illegal.

Florida's contention with respect to averaging of rates is, in any event, premature. As we explained in No. 84-504 (at 2, 6-7), the *Access Decision* did not prescribe rates; rather, it prescribed a framework for the recovery of a large part of the interstate share of the

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[10] See *Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844, 856-869, on reconsideration, 38 F.C.C.2d 665, 692-697 (1972) (requiring carriers to bring Alaska and Hawaii into the uniform mileage rate pattern that obtains in the 48 contiguous states, "with all that such approach implies in terms of nationwide cost averaging and equalizations for interstate ratemaking proposes"). See also *Integration of Rates & Services*, 87 F.C.C.2d 20 (1981).

cost of local exchange facilities. Local telephone companies thus far have been at liberty to charge differing rates, so long as they did not exceed the cap applicable to a particular class of service. See 84-504 Gov't Br. in Opp. 7 n.6. If petitioners or other interested parties believe that rates set forth in tariffs now in effect are unjust, unreasonable or unreasonably discriminatory under Sections 201 and 202 of the Act, 47 U.S.C. 201 and 202, they may challenge those rates directly in an appropriate proceeding. If a carrier's tariff reflects rates that are determined to be illegal, the Commission may prescribe reasonable rates and award damages. See 47 U.S.C. 205, 206-209.[11]

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[11] In separate proceedings subsequent to those sought to be reviewed here, the Commission has now imposed more specific requirements with respect to the end-user charges. Initially, a joint federal-state board was commissioned pursuant to 47 U.S.C. 410, to prepare recommendations on access charge amounts, for a transitional plan for implementation of those charges, and for mechanisms to ease their impact on low-income customers and in high-cost areas. See *Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 18318 (1984). The joint board proposed specific implementation measures and measures to ease the impact of implementation on those users and those companies that were particularly vulnerable. *Recommended Decision and Order*, 49 Fed. Reg. 48325 (1984). At a public meeting on December 19, 1984, the FCC voted to adopt the recommendations of the joint board in all important respects. FCC News Report No. 18196 (Dec. 20, 1984).

Under the plan adopted, the end-user charge for residential and single-line business customers will be set at $1 per month beginning June 1985, and increase to $2 per month in June 1986. The plan provides mechanisms for state regulatory commissions to set standards for waiver of access charges for low income subscribers; and it asks the joint board to consider further refinements to meet the needs of high cost companies and possible creation of "lifeline" service options. The Commission's December 19 decision has yet to be formally released. When that occurs, any party aggrieved by the Commission's actions to implement the *Access Decision* may secure judicial review. 47 U.S.C.

3. Petitioner Florida contends (84-824 Pet. 23-26) that the Commission's *Access Decision* will not actually achieve the policy objectives espoused by the Commission, in particular the continued availability of universal service and prevention of "uneconomic bypass." As explained below, this contention is unfounded. In any event it plainly does not warrant further review; Florida's quarrel with the Commission's ruling rests at root upon a different view of sound policy (on a matter committed to the Commission's judgment) rather than any objective legal principle.

Florida's assertion that the *Access Decision* will undercut the objective of universal service betrays a serious misunderstanding of the causes of escalating telephone rates and the manner in which the Commission attempted to ameliorate that problem.[12] In framing its *Access Decision* the Commission determined that the practice of "bypass," fostered by the pricing structure in the telephone industry as it existed in the 1970s and early 1980s, was likely to jeopardize universal service.[13] This was because traditional long-distance toll rates were artificially high because of distortions created by the recovery of non-traffic-sensitive costs through usage-sensitive rates. The Commission determined that, because long-distance service available through bypass technologies was substantially—albeit artificially—cheaper, large communications users

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402(a); 28 U.S.C. 2341-2349. Plainly no such challenge may be made in this case.

[12] Section 151 does not mention "universal service" in terms. The Commission does not question, however, that universal service is one of the public interest goals it should seek to advance. See Pet. App. 51a-52a.

[13] "Bypass" denotes the use by communications users of alternative distribution technologies in place of the local exchange system to route their communications. Pet. App. 44a-50a.

would increasingly abandon the local exchange system unless the distortions in the existing rate structure were reduced or eliminated.[14] This would in turn force up rates for those users who chose, for economic reasons or otherwise, to remain on the local exchange system. The court of appeals concluded that the Commission had justifiably responded to the uneconomic bypass phenomenon (Pet. App. 49a):

> The FCC sufficiently established the existence of bypass as a real market force. It sufficiently established both (1) the inability of regulators, under a noncost-based pricing system, to determine accurately the economic efficiency or inefficiency of a given technology, and (2) the likelihood that market participants under such a system will exploit available bypass technology when they can reduce their costs by doing so.

Thus the access charge system was designed to discourage uneconomic bypass by eliminating distortions in the apportionment of long-distance costs.

Petitioner Florida's fears that the access charge regime will undercut universal service are particularly unwarranted because, in order to ensure that universal service is not endangered, the *Access Decision* contemplates the creation of a Universal Service Fund. Subscribers in high cost service areas will, to a limited extent, be subsidized by that Fund, which will be comprised of sums collected through usage-based charges

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[14] Contrary to Florida's assertions (84-824 Pet. 23), bypass presents a viable alternative only for the large-scale user. The initial cost of deploying bypass technology is substantial, and small users accordingly would not find bypass technologies economically viable. Thus, it is plainly incorrect to assert that the end-user charge encourages bypass. Whatever else might be said about the end-user charge, it was designed to *discourage* bypass by those who were likely to be able to take advantage of bypass opportunities. See Report and Order, 93 F.C.C.2d at 252-253, and App. F to the Report and Order (J.A. 1301 in the court of appeals record); see also Pet. App. 44a-50a.

to be imposed on long-distance carriers. See 84-95 Gov't Br. in Opp. 4 n.2.

In sum, the *Access Decision* was in large measure a reaction to well-founded concern that the old pricing structure in the telephone industry presented a real threat to universal service. While some may disagree on policy grounds with the means chosen by the Commission to preserve universal service, the Commission's choice is supported by the record. As the court of appeals observed (Pet. App. 52(a)):

> The Commission had record support for the view that a charge could be imposed without substantial negative effect on universal service.

In addition, the Commission has undertaken to monitor the results of its decision and to make appropriate changes if necessary to preserve universal service. At its December 19, 1984, public meeting (see page 8 note 11, *supra*) the Commission received a report from its staff on the effects of its recent actions (including the *Access Decision*) (Dec. 20, 1984). The Commission resolved to continue to monitor the effects of these actions on local rates and the number of subscribers.[15]

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[15] Amicus curiae Los Angeles contends (Br. 7-9) that the Commission extended access charges to Centrex-CO service without adequate support in the record for its decision. This argument was not raised by any of the petitioners and accordingly is not properly before the Court. In any event, the court of appeals correctly upheld the Commission's decision with respect to treatment of Centrex-CO service (Pet. App. 57a-64a). Briefly, through Centrex-CO service, a large institutional customer may use telephone company switches to create an internal switched network without the expense of on-premises switchboards or PBX equipment. The service requires the use of more subscriber lines than the customer would use if it provided its own switchboard. Los Angeles' argument is that application of the flat per-line charge to each Centrex-CO line may result in making this service prohibitively expensive. The court of appeals determined that the record supports the Commission's determi-

4. Petitioners Wisconsin and New York also assert that further review is warranted here because of the pendency of other cases involving the exercise of FCC jurisdiction over telephone companies. 84-816 Pet. 4-11; 84-856 Pet. 14-16. The cases cited by Wisconsin and New York involve issues entirely distinct from the issues presented by the *Access Decision*. Those cases concern: (1) the preemptive effect of FCC depreciation policies and rates applicable to telephone plant equipment that is used indivisibly for intrastate and interstate service (*e.g.*, *Virginia State Corp. Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), appeal and petition for cert. pending, Nos. 84-871, 84-889); and (2) whether an FCC preemption order arising from rulemaking proceedings is enforceable in district court (*e.g.*, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 74. F.2d 1 (1st Cir. 1984), petition for cert. pending, No 84-900; *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), appeal pending, No 84-870). Nor is there merit to petitioners' contention that this Court should consider the impact of the divestiture decree in *United States* v. *AT & T*, 552 F. Supp. 131 (D.D.C.), aff'd, 460 U.S. 1001 (1983), on "the correct apportionment of regulatory jurisdiction between federal and state authorities." 84-816 Pet. 5, 12-13; 84-856 Pet. 7. It plainly is not the role of the courts to undertake to revise or reconsider allocations of regulatory jurisdiction so as to accommodate the divestiture. If there is a need to consider the "impact" of the divestiture on the apportionment of regulatory jurisdiction, Congress is the appropriate body to perform that task. See 84-95 Gov't Br. in Opp. 12-13 & n.5. The only question properly

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nation that Centrex-CO lines generate costs comparable to other subscriber lines, and that the FCC had taken reasonable measures to soften the impact of the new charges on Centrex-CO users (*ibid.*).

before this Court on these petitions is the lawfulness of the FCC's end-user access charges, and that question does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JACK D. SMITH
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

STEVE KAMINER
Assistant General Counsel
Federal Communications Commission

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No. 84-824

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. BILENKY*
General Counsel

PAUL SEXTON
Associate General Counsel

SIDNEY J. WHITE
Associate General Counsel

Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

February 11, 1985 **Counsel of Record*

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

BASIS FOR SUPPLEMENTAL BRIEF 1

SUPPLEMENTAL AGREEMENT 2

CONCLUSION 4

TABLE OF AUTHORITIES

The Communications Act of 1934
47 U.S.C. section 202 2

Miscellaneous

H.R. 151, 99th Cong., 1st Sess. (1985) 4

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BASIS FOR SUPPLEMENTAL BRIEF

This Supplemental Brief is filed pursuant to Supreme Court Rule 22.6. Its purpose is to apprise the Court of an order of the Federal Communications Commission which was issued subsequent to the filing of the original Petition for Writ of Certiorari in this case. Such actions are relevant and have a direct bearing on the arguments set forth by the Florida Public Service Commission in its original Petition.

On November 2, 1985, the Florida Public Service Commission filed its original Petition for a Writ of Certiorari

with this Honorable Court. That Petition seeks the Writ for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the actions of the Federal Communications Commission generally known as its *Access Charge Decision.* 93 F.C.C.2d 241 (*Report and Order*); 48 Fed. Reg. 42984 (1983) (*Order on Reconsideration*); and 49 Fed. Reg. 7810 (1984) (*Order on Further Reconsideration*). Respondents, Federal Communications Commission and United States of America, filed their Brief in Opposition on January 9, 1985. In that Brief, the Respondents referred to an unpublished decision by the Federal Communications Commission that was not yet "formally released." That decision was actually "formally released" on December 28, 1984.

SUPPLEMENTAL ARGUMENT

In its original Petition, the Florida Public Service Commission argues that the *Access Charge Decision* fosters unlawful discrimination in rates in violation of 47 U.S.C. section 202. (84-824 Pet. 17-21). In its *Brief for the Federal Respondents in Opposition,* the Respondents claim that "Florida's contention with respect to averaging of rates is, in any event premature." (Nos. 84-816, 84-824, and 84-856, Brief at 7). The Respondents contend that the *Access Charge Decision* did not prescribe rates, but rather only prescribed a framework for the recovery of a large part of the interstate share of the cost of local exchange facilities.

The Respondent's argument is disingenuous, for the Commission's *Access Charge Decision* did prescribe rates for multi-line business customers which have been implemented. The already adopted policy decision of the

Commission to implement a flat rate customer access line charge (CALC) has now come to fruition for residential and single line business customers. The Federal Communications Commission's December 28, 1984 Order implemented the flat CALC for all residential and single line business customers. This action substantiates the fact that the rates to be charged and applied under the *Access Charge Decision* are unrelated to any cost consideration and are patently unlawful under the Communications Act of 1934.

The Federal Communications Commission is strictly adhering to its established policy of flat access charges and rates have been imposed without regard to cost of service. Nothing in the Respondent's Brief in Opposition, nor the Federal Communications Commission's December 28, 1984 Order shows any hint of a concern about *ever* reconciling flat CALC to cost of service. Arguments that the Commission has not yet decided on its course of action with respect to the appropriate access charge rates are without merit in light of the Commission's action setting *exactly* the type of rates proposed in the *Access Charge Decision*. The Federal Communications Commission's illegal policy has been adopted and implemented. The flat CALC is in place. It is ripe for review.[1]

[1]The Respondents also cite to the December 28, 1984 Order to demonstrate that the Federal Communications Commission is actually sensitive to the threat to universal service that it has created. This is simply an effort to embellish the *Access Charge Decision* with the merits of a subsequent order while arguing that the defects of that order must be ignored. In fact, the "lifeline" assistance for low income families that the Federal Communications Commission has adopted is simply another foray by the Federal Communications Commission into the realm of intrastate ratemaking. The Federal Communications Commission will provide no assistance at all unless the states acquiesce to burdening intrastate rates with 50% of the cost of the program, a cost cause *solely* by Federal Communications Commission ac-

The Florida Public Service Commission has consistently opposed the imposition of any flat rate access charge, and the fact that the Commission has now decided to implement a one dollar CALC Instead of a two dollar CALC does not in any way effect the basic thrust of our argument against the rate structure imposed and its attendant discriminatory and unlawful effects on customers and state commissions alike.

CONCLUSION

The Federal Communications Commission has adopted a discriminatory flat customer access line charge without regard to the cost of service. This flat charge endangers the continued availability of universal telephone service.

Respectfully submitted,

WILLIAM S. BILENKY
General Counsel
(Counsel of Record)

PAUL SEXTON
Associate General Counsel

SIDNEY J. WHITE
Associate General Counsel

Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301-8153
(904) 488-7464

February 11, 1985

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tion. Lifeline rates are social considerations to be made by legislatures and not administrative fiat. See House Bill introduced by Congressman Micky Leland; H.R. 151, 99th Cong., 1st Sess. (1985).